No. 410

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In the Supreme Court of the United States

OCTOBER TERM, 1967

GARY DUNCAN,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of Louisiana

BRIEF FOR APPELLEE

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In the Supreme Court of the United States

OCTOBER TERM, 1967

GARY DUNCAN,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

BRIEF FOR APPELLEE

I. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the due process clause of the Fourteenth Amendment of the United States Constitution; Articles 779, 780 and 782 of the Louisiana Code of Criminal Procedure; Article 1, Section 9, and Article 7, Sections 41 and 42 of the Louisiana Constitution; and Louisiana Revised Statutes 14:2, 14:33, 14:34, and 14:35. These provisions are reprinted in Appendix "A" infra.

II. QUESTIONS PRESENTED

1. Does a prosecution under a State law which provides trial by a judge without a jury of a misdemeanor charge of simple battery as defined in R.S. 14:35, where a two year prison term *in parish jail without hard labor* may be imposed, but in which *two months was actually imposed*, violate the Sixth

and Fourteenth Amendments to the United States Constitution?

2. Does the Sixth Amendment jury provision make it mandatory that an accused be found guilty in state court by a 12-man unanimous jury?

3. If the Sixth Amendment jury trial right is applicable to the state through the Fourteenth Amendment, does the mechanical federal rule which denies the constitutional right to a jury trial when the actual sentence is six months or less, apply in state courts?

4. Does the requirement of jury trial in federal court, when the actual sentence is more than six months, which was prescribed by the United States Supreme Court under its supervisory power over lower Federal Courts, determine procedural due process in state criminal trials?

III. STATEMENT OF THE FACTS OF THE CASE

On December 5, 1966, a bill of information charging the appellant, Gary Duncan, with the crime of simple battery in violation of Louisiana R.S. 14:35 (1950) was filed in the Twenty-Fifth Judicial District Court of Louisiana (App. 1). On December 7, 1966, the appellant was arraigned and entered a plea of not guilty, and a trial date was fixed (App. 3).

Appellant filed a formal demand for jury trial prior to trial on January 25, 1967 (App. 4). Appellant cited authorities and was given an opportunity to urge his point on oral argument (App. 18-19). Be-

cause the offense charged was only a misdemeanor (Louisiana R.S. 14:2, 35 (1950) and because Louisiana Law authorizes no jury trial for such an offense (Louisiana Code of Criminal Procedure, Article 779), the trial judge denied the appellant's demand (App. 19).

On January 25, 1967, the appellant was tried in open court by the trial judge without a jury (App. 18-19). The facts surrounding the charge against the appellant were developed at trial as follows:

On the afternoon of October 18, 1966, the appellant, age nineteen (App. 62) was driving his car on Highway 23 in Boothville, Louisiana (App. 21, 24, 25, 43, 58-9). He stopped upon seeing four boys, age 14 (App. 20, 30, 43), talking to two other boys, one fourteen years old (App. 5) and the other sixteen years old (App. 58) on the side of the highway (App. 21, 26, 43, 52, 58-9). All witnesses, the State's and defendant's, testified that, after the exchange of a few words, the appellant struck the victim, one of the four young boys, on his arm. (App. 21, 28, 31, 44, 48, 52, 54, 57, 59) Appellant himself admitted on the witness stand that he made physical contact with the victim without the victim's consent (App. 64, 67, 71). This was the only blow struck by any party to this transaction.

The appellant was found guilty of simple battery (App. 73) and was sentenced to pay a fine of One Hundred Fifty ($150:00) Dollars and costs and to serve sixty days in the Parish Prison (App. 8). In

the event the fine and costs were not paid, the defendant was to serve an additional twenty days (App. 8).

It is significant that the prison sentence actually levied was for only a period of sixty days.

On February 20, 1967, appellant's request for a writ of certiorari, on the sole issue of entitlement to jury trial, was denied by the Supreme Court of the State of Louisiana (App. 14). Thereafter, appellant filed this appeal with the United States Supreme Court.

IV. SUMMARY OF ARGUMENT

Appellant's conviction of simple battery followed by a sentence of sixty days in the parish jail is equivalent to a proceeding to prosecute a petty offense which under the doctrine of this Court in *Cheff v. Schakenberg*, 384 U.S. 373, does not require a jury trial. Both the nature of simple battery and the actual sentence imposed on appellant meet the test of "petty offense" as set forth in *Cheff*, supra.

Therefore, even if the Sixth Amendment jury trial right applied to the States, appellant's conviction without a jury is proper. Consequently, this Court need not reach the constitutional question of applicability of said Sixth Amendment Guarantee.

In the alternative, if this Court should determine that appellant's conviction is not equivalent to a proceeding to prosecute a petty offense under the federal standard, the argument which follows is presented on the constitutional question.

The history of the jury trial right shows that the right to modify or abolish jury trial was reserved and used extensively by Parliament, and in the colonies, by the colonial, and later the state, legislatures. The Sixth Amendment was intended only as an ironclad restriction on the power of Congress to make changes in jury trials in federal courts. The States reserved to themselves (cf. Ninth and Tenth Amendments) the unrestricted power to change their own constitutional and statutory provisions regarding jury trials. When the Fourteenth Amendment was ratified, it did not take this reserved power from the States; nor did it transfer to the federal government the power to regulate jury trials in state courts. In many states today, misdemeanors carrying more than the six-months' penalty prescribed by federal law are tried without a jury.

This Court has never held that the Bill of Rights applied directly to the States or is incorporated in the Due Process Clause as a code of criminal procedure for the States. The fact that some rights included in the Bill of Rights have been held to be essential to due process does not mean that all rights specified therein must be applied to the States. Every right included in the Bill of Rights which has been applied to the States under the due process clause of the Fourteenth Amendment has been so applied only because it was held to be fundamental to liberty and justice, and in the case of Sixth Amendment rights, essential to a fair trial.

This Court has consistently held that a jury trial

is not essential to due process and that a fair trial may be had without a jury. This Court has consistently held that the Fifth Amendment right of indictment by grand jury for infamous offenses, the Sixth Amendment right of trial by jury in criminal prosecutions, and the Seventh Amendment right of trial by jury in suits at common law involving more than Twenty ($20.00) Dollars, all of which are comparable rights, do not apply to proceedings in state courts because they are not essential to a fair trial.

If this Court were to hold the Sixth Amendment jury trial right directly applicable to the States, conviction by a twelve-man unanimous verdict in all state courts would be constitutionally required for all but offenses considered "petty" under the federal, rather than the state, definition. The number of jurors required under the Sixth Amendment is dictated by antiquity rather than by any relationship to a fair trial, and the federal definition of a petty crime is based on an arbitrary six-months figure which has no relationship to a fair trial. Despite the fact that such standards have no relationship to a fair trial, many States would, under the Sixth Amendment application, be required to change their criminal jury procedures to conform with that of the federal courts. Such a result was never intended by the due process clause of the Fourteenth Amendment.

In the further alternative, if this Court should hold the Sixth Amendment jury trial right directly applicable to the States, it should declare that its holding is not retroactive in order to avoid throwing state

criminal procedures into utter chaos and exacerbating the already burgeoning crime rate.

V. ARGUMENT

A. THE SIXTY DAY SENTENCE ACTUALLY IMPOSED IN THE CASE AT BAR RENDERS APPELLANT'S TRIAL WITHOUT A JURY CONSTITUTIONAL EVEN IF THE SIXTH AMENDMENT JURY TRIAL PROVISION WERE APPLIED TO THE STATES.

For the reasons which follow, it is not necessary for this Court to reach the constitutional issues presented in appellant's brief.

1. *Cheff v. Schakenberg, 384 U.S. 373 (1966), this Court's latest pronouncement on the subject, considers the actual sentence imposed and not the maximum potential sentence as determinative.*

In *Cheff v. Schakenberg, supra,* this Court held that a federal court could constitutionally try a defendant for criminal contempt without a jury provided that the *actual* sentence imposed upon a finding of guilt was no greater than six months. The Court classified criminal contempt when the actual penalty imposed is six months or less as equivalent to a petty offense which constitutionally need not be tried by jury.

The sentence which may be imposed for criminal contempt is unlimited. Congress has left the length of such sentences to the discretion of the federal courts, 18 U.S.C. § 402. Sentences of *more than two years*

for criminal contempt in relatively recent times are not uncommon:

> "See, e.g. *Brown v. United States*, 359 U.S. 41, 79 S.Ct. 539, 3 L.Ed. 2d 609 (15 months); *Piemonte v. United States*, 367 U.S. 556, 81 S.Ct. 1720, 6 L.Ed. 2d 1028 (18 months); *Reina v. United States*, 364 U.S. 507, 81 S.Ct. 260, 5 L.Ed. 2d 249 (two years) *Green v. United States*, *supra* (three years); *Collins v. United States*, 9 Cir., 269 F.2d 745 (three years); *United States v. Thompson*, 2 Cir., 214 F. 2d 545 (four years).
>
> In the fiscal year ending June 30, 1962, a total of 21 people convicted by a federal court of contempt were received by the federal prison system. Of these, the average sentence was 6.4 months. Sentences of eight of these prisoners exceeded six months; three prisoners had sentences exceeding one year, and of these two prisoners had sentences of two years or more. The Federal Prison System—1964, Hearing before the Subcommittee on National Penitentiaries of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (Jan. 22, 1964), p. 10." *Cheff. v. Schakenberg*, 384 U.S. at 385, n. 3.

See also *Schillitani v. United States*, 384, U.S. 364 (1966) wherein this Court authorized the imposition of a two-year sentence for contempt without a jury trial through the semantic device of denominating as a "civil contempt" what the lower federal court had characterized as a "criminal contempt". See Justice Harlan's dissent, 384 U.S. at 983-984.

Manifestly, this Court in the *Cheff* decision, *supra*, did not consider the *maximum potential* sentence

as determining the right to a jury trial under the Sixth Amendment, but based its decision on the sentence actually imposed.

In the case at bar, while the maximum potential sentence for simple battery under R.S. 14:35 is two years imprisonment (without hard labor, in the parish jail) the sentence which was actually imposed on appellant was sixty days imprisonment in the parish jail.

Clearly, under the rationale and the holding of the *Cheff* decision, *supra*, appellant's trial without a jury would be constitutional even if the Sixth Amendment jury trial provision were applied to the States, because the sentence actually imposed on Appellant was less than the six months' limitation of the *Cheff.* decision, 384 U.S. at 380.

2. *The nature of simple battery as defined in R.S. 14:35 does not warrant its treatment as a serious crime.*

(1). *Frame of Reference*

According to English common law, the power of Parliament to provide for non-jury trials extended to more than just "petty offenses". Prosecution of some serious crimes such as arson, a felony, was accomplished without a jury in England. See 22 & 23 Car. II, c. 7 (1670); Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harvard Law Review 917, 927, 960, (1926); Kaye, Petty Offenders Have No Peers, 26 University of Chicago Law Review, 245, 247 (1959). *In United States v. Bishop*, 261 F. Supp. 969, 974, 975 (1966),

the power of Parliament and of colonial legislatures to direct that crimes, without reference to their nature as serious or petty, should be tried without a jury was acknowledged. See also Kaye, Petty Offenders Have No Peers, 26 University of Chicago Law Review at 246-257 (1959). Blackstone's complaint that non-jury procedure "has of late been so far extended, as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in *capital* cases" shows the constantly increasing scope of summary jurisdiction in Blackstone's England. See 4 Blackstone's Commentaries 277-78. Writing of 18th Century England, Holdsworth points out the extensive stream of statutes extending the number and variety of summary penal proceedings without indictment or trial by jury before one or more justices of the peace. 10 Holdsworth History of English Law 159-160 (1938). In the Fourth Institute Coke states that Parliament's power and jurisdiction is "so transcendent and absolute as it cannot be confined either for causes or persons within any bounds". 4 Coke's Institutes 36; see Lyon, Edward Coke (Houghton Mifflin 1929), p. 354, p. 348, "The supremacy of Parliament which Coke advocated during his years in the House of Commons, after his removal from the bench". See also Radcliffe & Cross, The English Legal System (3d ed. 1953) pp. 174, 175.

With reference to jury trials in federal court, the Sixth Amendment has been judicially interpreted as "preservative"; i.e. Jury trial in federal court was "frozen" as of the time of the Sixth Amendment's

adoption, Congress being powerless to make changes therein. According to this interpretation, based on the "freezing principle" those crimes triable by jury in England and in the States at the time of the adoption of the Sixth Amendment required trial by jury in federal court. Conversely, those crimes triable summarily by justices of the peace or other magistrate without a jury in England or in the States when the Sixth Amendment was adopted were excepted from that Amendment's operation. The latter were designated by this Court as "petty offenses". See *Callan v. Wilson*, 127 U.S. 540 and *Schick v. United States*, 195 U.S. 65. Because such offenses were categorized by reference to English common law, summary practice which Parliament constantly modified and the practice of thirteen different states controlled by thirteen different legislatures, it was no wonder that the standards suggested by this Court to delineate "petty offenses" were vague: "punishable by commitment to jail, a workhouse or a house of correction"; "not indictable at common law"; "its moral quality is relatively inoffensive"; "malum prohibitum" as opposed to "malum in se"; "the practice of a community taken as a gauge of its social and ethical judgments". See *D.C. v. Colts*, 282 U.S. 63; *D.C. v. Clawans*, 300 U.S. 617 Cf. *U.S. v. Martinelli*, 240 F. Supp. 365 (1965).

Although this court attempted to rationalize its position by referring to Blackstone's English Common Law and State Practice the "petty offense" category was carved from the Sixth Amendment guarantee of trial by jury in *all* criminal prosecutions out of ex-

pediency; the necessity of federal courts to be able to dispose of certain minor crimes summarily, despite the Sixth Amendment's guarantee. See McCart, Trial by Jury (Chilton, page 45) (1964). See A. L. I. Model Penal Code, Tentative Draft No. 2, Comment following Section 1.05, p. 8, declaring that it is an inadmissable semantic manipulation to declare that any offense subject to a sentence of imprisonment is not a crime.

It is not Appellee's purpose to quarrel with this Court's "petty offenses" jurisprudence, or to champion the argument of Kaye, 26 University of Chicago Law Review, *supra*, that Congress is thereby allowed to evade the Sixth Amendment, by the judicial technique of exempting "petty offenses" from the definition of "crimes" and "all criminal prosecutions". Appellee's position is that the federal determination of what constitutes a petty crime, which is the off-spring of expediency and vagueness, should not bind the states in determining what is a petty crime for state purposes. Furthermore, as stated in *U.S. v. Krapf*, 180 F. Supp. 886, 890 (D.C. N.J. 1960)

> "Federal offenses and State offenses are by no means the same or clearly comparable. Because of the difference between the Federal jurisdiction and that of the State, many Federal offenses are quite incomparable to those of the State. It is therefore impossible to compare the nature of every State offense with the nature of every Federal offense".

Nevertheless, it is clear that simple battery as

defined in Louisiana Revised Statutes, Title 14, Section 35, is, even under the federal test, a crime of a minor nature, which would allow summary trial when provided by the state legislature.

(2) *English Common Law*

Simple battery as defined in Louisiana Revised Statute, 14:35, is not and was not an indictable offense and triable by jury at common law.

Appellant's argument that battery is not a minor offense, fails to distinguish between simple battery and aggravated battery. Appellant's citation of *State v. Stewart*, 89 N. Car. 563 (1883) to support his argument shows his confusion between simple battery and aggravated battery. In *State v. Stewart, supra*, the defendant assaulted the victim "above the left eye inflicting two wounds a half inch long and cutting to the bone". Because of the great bodily harm inflicted, this was an aggravated degree of assault (battery).

Appellant's confusion between simple battery and aggravated battery is again shown by his citation of *In re Robinson*, 20 D.C. 570 (Sup. Ct. D.C. 1892) to support his argument that simple battery is not a minor offense. In *Robinson, supra*, defendants were charged with assault and battery by "beating, wounding and ill treating" the victim, an aggravated degree of the crime. In discussing whether in England prior to the enactment of the statute known as 9 Geo. 4, a defendant was tried without a jury for assault and battery, the Court stated, "There was probably before that time a period when assaults *without battery or*

wounding were tried by inferior tribunals without a jury . . . where the party is charged with *not only an assault but with beating and wounding*, he is entitled to a trial by jury". 20 D.C. 571. (emphasis supplied). In this case the meaning of "assault and battery" is beating and wounding, an aggravated degree of the crime.

Work v. State, 2 Ohio St. 296, the third case cited in appellant's brief as supporting the view that battery prosecutions require jury trials, holds that jury trials cannot be dispensed with even for petty offenses. As such the *Work* case is contrary to *D.C. v. Clawans*, 300 U.S. 617.

Chitty was careful to point out in editing Blackstone's Commentary on Assault and Battery:

> "See 9 Geo. IV c. 31, § 24 to 29; prescribing the punishment of particular assaults, *and the summary proceeding before two justices in case of common assaults*". Emphasis supplied
>
> 2 Chitty's Blackstone Commentaries, 4th Book, page 166, Note 20.

In *State v. Maier*, 13 N.J. 235, 99 A. 2d 21, 29, the Court commented as follows upon the above statute:

> "The English practice of handling assaults and assaults and batteries from the simplest cases to the more grievous ones illustrated by the diary of Justice Hunt was codified for the first time in 9 Geo. 4, c. 31 (1828), dealing with various offenses against the person. Section 27 authorized summary proceedings before two justices of the peace for common assaults and batteries on pen-

alty of a fine not exceeding five pounds or two months imprisonment on default of such payment. Section 29 gave the justice of the peace the right not to adjudicate the controversy if 'from any other circumstance' it appeared to him to be 'a fit subject for prosecution by indictment'. There can be no doubt but that by 'common assaults and batteries' was meant what we in this State have called 'simple assaults and batteries', as distinguished from the high misdemeanors set forth in N.J.S. 2A:90-1, 2, 3, N.J.S.A., supra. England met the problem of the broad range of assaults and of assaults and batteries by leaving to the determination of the justice of the peace whether the suit should be a summary one without indictment and trial by jury or one that he should submit to the grand jury for indictment and if indictment were found, to be followed by trial by jury. New Jersey has met the same basic problem by treating as disorderly conduct the acts which heretofore would have constituted the crime of assault or assault and battery, leaving for indictment and trial by jury the special kinds of assault and battery comprehended within the three kinds of high misdemeanors just referred to, thus sparing the defendant in the cases treated as disorderly conduct from the personal disgrace of a criminal record and all of the social and business disadvantages which flow from a criminal conviction, including the loss of his right to continue to hold any public office he then occupied, N.J.S. 2A:135-9, N.J.S.A., or to qualify for a civil service position, R.S. 11:9-6, N.J.S.A., R.S 11:23-2, N.J.S.A., or the right to serve as a juror, N.J.S. 2A:69-1, N.J.S.A. *In any event, there can*

be no doubt of the power of the justice of the peace at common law before 1776 to punish common or simple assaults and assaults and batteries summarily, without presentment or indictment and without trial by jury." (Emphasis supplied)

It has been pointed out that in Blackstone's England at Common Law no substantive distinction was made between different degrees of violence, there were no degrees of the offense of assault or of assault and battery which ranged from minor offenses as merely touching of the person to violence falling just short of manslaughter, and the crimes of "aggravated assault", "aggravated battery" and "simple battery" were unknown and had no technical or definite meaning. 1 Wharton's Criminal Law and Procedure (1957) Sec. 358, p. 714; 6 American Juris. 2d Verbo Assault and Battery, Sec. 1, 5; *State v. Maier, supra,* 99 A 2d at 24 (1952).

Nevertheless, Blackstone himself qualifies his discourse on assault and battery by the words "*where they are committed with any very atrocious design*". (Emphasis supplied.) 4 Blackstone Commentaries at 216-217; 2 Chitty's Blackstone Commentaries, 4th Book, p. 116; Erlich's Blackstone (Nourse 1959) p. 855.

Thus, although the technical term "simple battery" as distinguished from "aggravated battery" was unknown to Blackstone, he was in fact treating only aggravated assaults and batteries as indictable. Furthermore, in the same passage Blackstone categorized assaults and batteries as "inferior offenses or misde-

meanors". Blackstone's definition of a misdemeanor is as follows:

> "in common usage, the word crimes is made to denote such offenses as are of a deeper and more *atrocious* dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only". 4 Blackstone's Commentaries, p. 5.

In speaking of affrays, Blackstone again touches on the idea of grading the offense according to whether the circumstances were aggravated:

> "Affrays (from affraier, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects; for, if the fighting be in private, it is no affray but an assault(b). Affray may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue (c). But more "especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace (d). The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case; for, where there is any material aggravation, the punishment proportionably increases". 4 Blackstone's Commentaries at 145; 2 Chitty's Blackstone Commentaries, 4th Book, page 107.

Thus according to Blackstone a person guilty of an affray (public brawling) which is a much more serious crime than "simple battery" could be deprived of his liberty by the constable on his own authority until he decided that "the heat was over"!

II Hawkins Pleas of the Crown 17 (7th Ed. 1795) cited by Appellant as authority for his statement that battery was an indictable offense is inapplicable as it deals with the private law of contracts, covenants, debts, etc. and discusses a conflict of jurisdiction in civil, not criminal cases.

II Hawkins, Pleas of the Crown, p. 77, paragraph XIII, Sec. 63 (1795) is contrary to Appellant's argument and reads as follows:

> "XIII. What authority justices of peace have in relation to inferior offenses.
>
> Sec. 63. It would be endless to enumerate all the offenses within their jurisdiction, concerning which there have been great numbers of statutes —they are empowered to hear and determine all trespasses, which is a word of a very general extent, and in a large sense not only *comprehends all inferior offenses, which are properly and directly against the peace, as assaults and batteries and such like*, but also all others which are so only by construction, as all breaches of the law in general are a said to be". (Emphasis supplied).

3 Bacon, A New Abridgement of the Law (4th ed. 1778), 292, states:

> "And therefore, it hath been held, that not only

assaults and batteries, but libels, barretry, and common night-walking, and haunting bawdy-houses and such like offences, which have a direct tendency to cause breaches of the peace, are cognizable by justices of the peace, as trespasses within the proper and natural meaning of the word . . ." 3 Bacon, A. New Abridgement of the Law (4th ed. 1778), 292 (Emphasis supplied)

The significance of the jurisdiction of the justice of the peace over all forms of trespass, including assault and battery, is explained in 2 Holdsworth, History of English Law 364 (1923), in which Holdsworth explains the dual nature of trespass, including assault and battery, as torts begun at the suit of the injured individual as well as actions criminal in nature. According to Holdsworth the growth of the misdemeanor arose from the penal nature of such actions when justices of the peace took over the smaller criminal business and trespasses as criminal actions were presented to them for trial. (In *U.S. v. Bishop*, 261 F. Supp. 969, the court stated that trespass was not *malum in se* and did not connote serious moral turpitude).

By way of explanation it should be stated that at common law offenses triable in justice of the peace courts were not entitled to jury trials and were designated as "summary". See 4 Blackstone Commentaries, 277-78; Blackstone's Commentaries (Bernard Gavit ed.) p. 869; Erlich's Blackstone (Nourse 1959) p. 888.

Sidney and Beatrice Webb, in their English Local Government, vol. 1, at 418-419 give an even more spe-

cific account of the work of justices of the peace outside of the quarter sessions:

> "Their criminal jurisdiction ranged from the smallest misdemeanor penalized by a shilling fine, such as the utterance of an oath or the commission of a trivial statutory nuisance, up to the grave offenses of incorrigible vagabondage, rick-burning, or the killing of game, for which severe corporal punishment, a long term "of imprisonment, or even in one case, seven years transportation could be inflicted. . . .
>
> "Yet there was no provision for any trial by jury or for the publicity of an open court. Even in prosecutions under such drastic penal statutes as those relating to vagrancy and the preservation of game, the 'Single Justice' or the 'Double Justice' heard the case whenever he chose, without necessarily admitting the public, or even the defendant's attorney; took whatever evidence he deemed necessary, and himself decided both law and fact."

In referring to the diary of William Hunt, a justice of the peace of the County of Wilts for the years 1743-1748, they state:

> "We see him doing something every two or three days, granting warrants and summonses, signing parish accounts, swearing persons to affidavits, issuing certificates and passes of one sort or another, disposing of petty cases of bastardy, *assault*, 'hedge-pulling' and nonpayment of wages . . ." Id., 389 (Emphasis supplied)

An examination of Hunt's Diary dealing with assault and battery reveals the following entries:

"31 Oct., 1744. Granted a warrant against Benjamin Lewis of Markett Lavington, for violently *assaulting* of Edward Ivey of the parish of Burbidge, sheriffs baylief, *complainant*. Upon hearing the evidence of William Bell and William Bishop was so clear against him that I committed him to the Bridewell at Devizes". (Emphasis supplied)

In England "bridewell" is a term applied to "a house of correction; loosely a jail or prison". Webster's New International Dictionary. Another example is:

"21 May, 1745. Granted a warrant *on the complaint* of Mary Draper of Easterton, for an *assault* upon her by Elizabeth Plank, Mary Draper, Sarah Draper, Mary Draper junior and Elizabeth Jarvis, all of Easterton; upon a hearing the said complaint their mittimus was made to the house of correction, but afterwards were released by consent of the parties, paying charges." (Emphasis supplied)

A "mittimus" in English criminal practice was "a precept in writing, issuing from a court or magistrate, directed to the sheriff or other officer commanding him to convey to the prison the person named therein, and to the jailer, commanding him to receive and safely keep such person until he should be delivered by due course of law." Black's Law Dictionary 1153.

In Coke's Third Institute (London 1797) Cap. 82, p. 177 we are told that malicious striking with any weapon, or the drawing of any weapon in a church or church yard, could be tried before "justices of the

peace in their sessions" and were subject to penalty of loss of an ear or branding.

Discussing summary jurisdiction of justice of the peace courts in England in the 16th, 17th and 18th centuries, legal commentators have pointed out that such courts were given power by Parliament to try many specific minor offenses, a comprehensive list of which is impossible, but swearing, drunkenness, vagrancy and assault are cited as examples. Radcliffe and Cross, The English Legal System (3d ed. 1953) pages 202-204, 348-349.

Under current English practise, a common assault (which is like Louisiana's "simple battery") is not indictable and is heard by a court of summary jurisdiction without a jury. If convicted, the offender may be sentenced to imprisonment at hard labor. Offenses against the Persons Act, 1861 (24 and 25 Vict. c. 100) See Vol. 9 Halsbury's Laws of England (Halshan's 2d 3d. 1933), Sec. 812, note (a). A person charged with common assault (which is like our "simple battery") does not have a right to an indictment, or to a trial by jury, but is tried by a court of summary jurisdiction. Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) s. 17; see Vol. 9, Halsbury's Laws of England, Sec. 55, pp. 52-55; Radcliffe and Cross, The English Legal System, (3d ed. 1954) p. 349. In 1951 in England, 11,000 persons were found guilty of the non-indictable offense of assault without a jury. Radcliffe and Cross, op. cit. *supra*, p. 349.

It is incongruous to argue that England, the birth

place of common law, can try simple batteries (common assaults) summarily, but that Louisiana may not.

(3) *United States*

"The bulk of the daily business of the criminal justice system consists of offenses that are not major—of breaches of the peace, crimes of vice, petty thefts, *assaults arising from domestic or street-corner or barroom disputes.* These . . . are disposed of in much less formal and much less deliberate ways." (Emphasis supplied). The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement And Administration of Justice, p. 7.

Generally throughout the United States simple battery has been treated as a minor offense. See *D.C. v. Clawans*, 300 U. S. at 662, 663, text at notes 2, 3, 4, 5 and 6.

Alabama's Constitution of 1867, Section 10, authorized the state legislature to dispense with a grand jury and authorize the prosecution by justices of the peace or other inferior courts of *assault, assault and battery*, along with affray, unlawful assembly, vagrancy, petit larceny, and other misdemeanors. I. Thorpe, American Charters, Constitutions and Organic Laws 1492-1908 (Washington Government Printing Office 1909) page 133.

Arkansas's Constitution of 1864, although providing in Section 11 for trial by jury in prosecutions by indictment or presentment, provided in Section 18 for the institution of assault and battery prosecutions by summons or warrant and trial thereof before jus-

tices of the peace. Arkansas's 1868 Constitution, Section 9, required presentment or indictment of a grand jury except "in cases of petit larceny, *assault, assault and battery*, affray, vagrancy, and such other *minor* cases as the general assembly shall make cognizable by justices of the peace". (Emphasis supplied). Although Section 6 of Arkansas's 1868 Constitution provided that "the right of trial by jury shall remain inviolate", and Section 8 provided that in all criminal prosecutions the accused shall enjoy the right to trial by an impartial jury, Section 20 of the same Constitution provided that "the jurisdiction of justices of the peace shall extend to all matters less than felony for final determination and judgment". I Thorpe, *op. cit. supra*, pp. 291, 302, 307, 320.

Delaware's Constitution of 1831, Section 15, authorized the state legislature to grant jurisdiction of *assaults and batteries* and other specified crimes of a minor nature (including violation of licensing laws and nuisances) to one or more justices of the peace, to be proceeded against without indictment and tried without a jury. Section 15 specifically excludes assaults and batteries from the Delaware Constitution's general provision for trial by jury. Section 30 of Delaware's Constitution of 1897 is to the same effect. I Thorpe *op. cit. supra*, p. 593, 618.

Massachusetts' Constitution of 1780, Section XII, while providing that no one shall be deprived of life, liberty or property but by judgment of his peers or the law of the land, limited trial by jury to those

crimes subject to "a capital or infamous punishment". 3 Thorpe, *op. cit supra*, p. 1891.

South Carolina's 1868 Constitution Section 22 gave justices of the peace original jurisdiction of assault and battery prosecutions. 6 Thorpe, *op. cit. supra*, p. 3294.

In *Lancaster v. State*, 90 Md. 211, 44 A. 1039 (C. A. Maryland 1899) the defendant was charged with simple assault, tried and found guilty by a justice of the peace without a jury, and sentenced to eighteen months imprisonment and $10.00 fine. The Maryland court held that under the provisions of the state constitution the legislature could confer summary jurisdiction on justices of the peace to try persons for assault and battery, stating the following:

> "There can be no question since the decisions of this court in the cases of *State v. Glenn*, 54 Md. 599, and *Danner v. State*, 89 Md. ....., 42 Atl. 965, *that the legislature can, under the provisions of the Constitution of this state, confer summary jurisdiction upon justices of the peace to try persons for assaults and batteries.* In the recent case of *Danner v. State*, 89 Md. ....., 42 Atl. 965, this court said, in passing on a similar statute, that it would seem to be clear that the general scope and purpose of the law was to confer jurisdiction on the magistrate to hear and finally determine only in *such minor offenses as were punishable by imprisonment in the jail or house of correction or by pecuniary fine*—" (Emphasis supplied).

In *People ex rel Murray v. Special Sessions Jus-*

tices, 74 N.Y. 406 (1878), it was held that one charged with assault and battery was not entitled to trial by jury under the state constitutional provision that trial by jury in cases in which it had been heretofore used should remain inviolate because assault and battery at the time of the adoption of the state constitution was a petty offense triable without a jury. The court stated the following:

> "Courts of Special Sessions have existed since 1744, and have been continued both under the Colonial and State government to the present time. No jury was permitted in these courts until 1824, when the Legislature provided for a jury of six to be selected from twelve to be drawn if demanded by the accused, and this is the law throughout the State at the present time except in the city of New York. There if an accused person elects to be tried before the Court of Special Sessions he is tried without a jury."

In *State v. Maier*, 13 N. J. 235, 99 A. 2d 21 (1953), a prosecution for assault and battery by spitting upon the face and body of the victim, in violation of New Jersey's Disorderly Persons Law, which defines a person who commits an assault and battery as a disorderly person, the state supreme court held that simple battery is a petty offense, neither indictable nor required to be tried by jury under the state constitutional provisions providing indictment and trial by jury in all criminal prosecutions. The penalty imposed by the Disorderly Persons Law on simple assault and battery was not more than one year's imprisonment in a county workhouse, penitentiary, or jail, or a fine

of $1,000, or both. In an exhaustive and learned opinion, Chief Justice Vanderbilt reviewed the summary jurisdiction of justices of the peace at common law and the growth of legislation enlarging such jurisdiction, pointing out that the problem was universal in the administration of justice.

> "In every jurisdiction, it is necessary to provide the machinery for the effective punishment in summary fashion of minor offenses and breaches of the peace that fall far short of being crimes which require formal treatment . . ." 199 A. 2d at 25.

The New Jersey Court concluded that justices of the peace at common law prior to and during the Eighteenth Century undoubtedly had power to punish common or simple assaults and batteries summarily without indictment and without trial by jury, and that since that time, the Eighteenth Century summary jurisdiction over many other petty offenses more serious in nature than simple battery has been inevitably expanding in response to the changing needs of modern society.

Appellant contends that disorderliness is a classic instance of a common law petty offense; yet New Jersey has classified simple battery as disorderliness, and its highest court, in *Maier, supra,* stated that "many of the offenses which have long been considered disorderly conduct . . . involve more serious conduct than does simple assault or simple assault and battery". 99 A. 2d at 34. See also *State v. Zucconi,* 93 N. J. Super. 80, 226 A. 2d 16, 19-20 (1967).

The American Law Institute in its Model Penal Code, Tentative Draft No. 13, Sec. 250.1 (1) defines disorderly conduct as follows:

> "(1) *Disorderly Conduct.* A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or with knowledge that he is likely to cause public inconvenience, annoyance or alarm, he:
>
> "(a) *engages in fighting*, threatening, or violent or tumultuous behavior;
>
> "(b) makes unreasonable noise or course (indecent?) utterance, gesture, or display, or addresses abusive language to any person present; or
>
> "(c) otherwise creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.
>
> " 'Public' means affecting or likely to affect persons in a neighborhood, highway, school, hospital, prison or other institution, apartment house, office building, transport facility, shop, or other place to which the public or a substantial group has access. Disorderly conduct is a petty misdemeanor if the actor has the purpose to cause substantial harm or serious inconvenience, annoyance or alarm, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation." (Emphasis supplied)

Engaging in fighting, threatening or violent behavior designated as disorderly conduct by A. L. I. involves conduct of a similar nature as that involved in simple battery, and appellant admits that disorderly conduct is a "classic petty offense".

Congress itself considers simple battery a petty offense. U.S.C. 18, Section 113 (d) and (e) make assault by striking, beating, or wounding, as well as simple assault, petty offenses, in accordance with U.S. C. 18 Section 1.

That simple battery, as defined in La. R. S. 14:35 does not involve moral turpitude and is not *malum in se* is shown by the circumstances which except the same conduct which would constitute simple battery from the category of a crime. Thus the same act which would constitute simple battery if done with the consent of the victim, is not a crime (In aggravated battery, the victim's consent is no defense.) See R.S. 14:34 and 14:35. Thus, blows given in the course of rough horseplay or during an athletic contest do not constitute simple battery. Further, a parent may correct a child and a schoolteacher may use reasonable corporal punishment in the correction of his pupils without being guilty of simple battery. See Clark and Marshall Crimes, p. 315; Wharton's Criminal Law and Procedure (1957) p. 694; Archbold's Criminal Pleading, (1943) p. 931.

The kind of actions which can constitute simple battery illustrate its minor nature: A blow inflicted as a joke without the victim's consent is a battery, as neither malice nor anger is necessary to a battery in some jurisdictions. Merely touching another's clothing or his chin without his consent is a battery. In some states hazing by social clubs is a battery. Wharton *op.cit. supra*, pp. 685-687. And in *Moreland v. State*, 125 Ark. 24, 188 S. W. 1 (1916), it was held that a

defendant who took a young woman's wrist and attempted to kiss her without her consent had committed a battery.

From the type of offenses which have been held to constitute simple battery, it is clear that the moral quality of the crime is relatively inoffensive and that it is not *malum in se*.

(4) *Louisiana*

Unique among her sister states, Louisiana under the dominion of France and Spain until the early nineteenth Century, inherited a continental legal system derived from Rome through the systems of France and Spain. See Elliott & McDonald, Western Political Heritage (Prentice-Hall 1949) p. 247; Wormser, The Law (Simon and Schuster 1949) p. 404; 8 The History of North America (Guy C. Lee, ed. 1904) pp. 239-253. Under this Romanesque or civil law system, bench trial rather than jury trial was the mode of determining facts. See Freed, Aspects of French Criminal Procedure, 17 La. L. Rev. 730 (1957); Pugh, Administration of Criminal Justice in France, 23 La. L. Rev. 1 (1962); McCart, Trial by Jury (Chilton 1964) p. 14; Wigmore, Panorama of the World's Legal Systems (Library Ed.) pp. 408-409.

As a territory for nine years in the early nineteenth century, Louisiana was under the exclusive jurisdiction of the United States, and its court procedure came directly under the operation of the Sixth Amendment. *Webster v. Reid*, 11 Howard 437, 459;

Spies v. Illinois, 123 U.S. at 169; *Thompson v. Utah*, 170 U. S. 343.

The people of Louisiana were dissatisfied with the territorial law affecting them. Among other things, they objected to jury trials because having been instilled by their French heritage with respect for superior training, they were at a loss to understand how a jury of unschooled men could dispense justice. McGinty, A History of Louisiana (Exposition Press 1949) pp. 106-107.

The first territorial legislature of Louisiana passed Louisiana's first general criminal statute called the "Crimes Act of 1805", providing in Section 33 that the crimes and misdemeanors therein specified and method of criminal procedure should be construed according to the English common law, unless otherwise provided. This Act (Act 50 of 1805) provided punishment of long prison terms at hard labor for serious crimes such as murder, arson, burglary, rape, manslaughter, maiming, and riot. Battery was "low man on the totem pole" and treated as a minor misdemeanor punishable by a fine or imprisonment or both at the discretion of the judge.

Louisiana Act 50 of 1805 was typical of that described in *Schick v. U. S.*, 195 U. S. 65 as follows:

> "In some states, in the same act are gatherned all the various offenses against the person, ranging from simple assault to murder; and imposing punishment from a mere fine to death."

The native Louisiana bar looked upon the Crimes

Act of 1805 with disfavor; they did not want the common law, a system with which they were unfamiliar, introduced into Louisiana to replace the civil law system. Therefore, with statehood imminent, the 1812 Constitutional Convention adopted the provision, still in existence in Louisiana organic law today, prohibiting the legislature from adopting a system or code of laws by general reference thereto. See Marr, The Necessity for a Criminal Code in Louisiana, 4 Tulane Law Rev. 18 (1929).

Since that time, there have been no so-called common-law crimes in Louisiana, nothing being a crime which is not made so by express statute. *State v. Bischoff*, 146 La. 748, 84 So. 41 (1920); *State v. Robinson*, 78 So. 933 (1918).

Subsequently, Louisiana legislatures passed numerous statutes penalizing conduct constituting battery wherein only the aggravated batteries were punishable as felonies with long imprisonment at hard labor, and conduct constituting simple battery as defined in R.S. 14:35 was consistently treated as a misdemeanor, punishable with fine or imprisonment in the parish jail, or both. Thus, assault with intent to murder (Act 43 of 1890), wounding with intent to kill (Act 44 of 1890), biting or maiming (Act 95 of 1898), putting out eyes (Revised Statutes 1870, Sec. 798), scalding or throwing acid on a person (Act 116 of 1912) were all felonies. On the other hand conduct constituting simple battery was punishable as a misdemeanor (Revised Statutes 1870, Sec. 796, 797; Act 107 of 1902).

The distinction between aggravated battery as a serious crime and simple battery as a misdemeanor was also recognized by Edward Livingstone in his proposed criminal code for Louisiana. See, *Complete Works of Edward Livingston on Criminal Jurisprudence*, Title XIX, Chapter 1, Section I, Article 406, which states that a "battery . . . may be a misdemeanor or a crime, according to the measure of violence or the intent with which it is offered."

The Louisiana Supreme Court has also recognized that a battery may include such trifling conduct as touching or laying hold of another person or his clothes. *State v. Robertson*, 48 La. Ann. 1067, 20 So. 296 (1896); *State v. Foster*, 156 La. 889, 101 So. 255 (1924).

With this background, the Louisiana Criminal Code of 1942 (now Title 14 of the Louisiana Revised Statutes of 1950) was enacted, eliminating the various assault and battery statutes mentioned above and distinguishing between aggravated battery and simple battery (Cf. R.S. 14:34 and R.S. 14:35) according to the seriousness of the prohibited conduct and the likelihood of serious bodily injury. The key to the difference is the means used to commit the act and the manner in which it is used. Thus, the use of a dangerous weapon as defined in R.S. 14:2 in a manner *calculated or likely to produce death or great bodily harm* distinguishes aggravated battery, a felony punishable in the penitentiary, (R.S. 14:34) from simple battery, a misdemeanor punishable in the parish jail (R.S. 14:-35).

Simple battery as defined in R.S. 14:35 is the use of force or violence on another's person without his consent, committed *without* the use of a dangerous weapon. Battery involves general, not specific, criminal intent. Therefore, an intent to injure is not a necessary element of simple battery. It is only necessary that the act constituting the simple battery be voluntary on the part of the accused and not consented to on the part of the victim. See, *In re Glassberg*, 230 La. 396, 88 So.2d 707 (1956) (although dealing with aggravated battery, the case enunciates principles concerning general intent which applies to simple battery as well). See, also, Bennett, The Louisiana Criminal Code—a comparison of prior Louisiana Criminal Law, 5 La. Law Rev. 6 (1942).

After tracing the treatment of assault and battery in Louisiana from the Crimes Act of 1805 to the present, we see that historically, in Louisiana, the conduct constituting simple battery has never been considered *malum in se* or as importing serious immorality. Louisiana follows other jurisdictions in providing that the same conduct constituting simple battery is not a crime if the victim has consented. In Louisiana, a conviction of simple battery, a misdemeanor, carries with it no civil disabilities. See, Opinions of the Attorney General, State of Louisiana 1928-1930, p. 632.

By way of contrast, aggravated battery is *malum in se* in Louisiana and the victim's consent is no defense to a prosecution therefor. Because it is a felony, a conviction of aggravated battery carries with it serious civil disabilities: disqualification as a voter or

office holder (La. Const. of 1921, Art. 8, Sec. 6); disqualification as an executor or administrator of an estate or as tutor of a minor (La. Code of Civil Procedure Arts. 3097, 4231); disqualification to hold a liquor license (R.S. 26:79); grounds for immediate divorce (La. Revised Civil Code, Art. 139).

The imposition of such disabilities on convicted felons but not those convicted of misdemeanors shows Louisiana's judgment that those crimes which it designates as felonies, like aggravated battery, import serious moral turpitude, while those which it designates as misdemeanors, like simple battery, do not.

It is therefore submitted that the nature of "simple battery" as defined in Louisiana Revised Statutes 14:35 qualifies it as a "petty offense" under Sixth Amendment federal standards. In view of its nature as a petty offense, in view of the two months' actually imposed on appellant, and in view of this Court's holding in *Cheff v. Schnackenberg*, 384 U.S. 373 that an actual sentence of six months qualifies an offense as a petty one, appellant's trial without a jury was permissible even if the Sixth Amendment jury trial provision applied directly to the States. Consequently, this Court need not reach the constitutional question of applicability to the States of the Sixth Amendment jury trial guarantee.

In the alternative, it is submitted that the Sixth Amendment federal jury trial standard does not apply to the States, the right to a jury trial being determinable only by reference to the due process clause of

the Fourteenth Amendment, and as such required only if essential to a fair trial.

B. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT INCORPORATE THE BILL OF RIGHTS; A RIGHT SECURED BY THE BILL OF RIGHTS IS BINDING ON THE STATES ONLY IF IT IS INDISPENSABLE TO LIBERTY AND JUSTICE.

On numerous occasions for well over a century, Appellant's theory that the due process clause of the Fourteenth Amendment incorporated the entire Bill of Rights has been presented to and rejected by this Court.

In 1833 this Court determined that the first eight amendments were directed at the Federal Government. *Barrow v. Mayor of Baltimore*, 7 Pet. 243. Chief Justice Marshall, a staunch Federalist, stated "In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments. . . . These amendments contain no expression indicating an intention to apply them to the state governments. This Court cannot so apply them."

Any student of *The Federalist* knows that Madison, Jay, and Hamilton spent a good deal of time and space attempting to allay the fears of those who did not consider that the proposed Constitution sufficient-

ly protected their liberty against encroachment by the Federal Government.

"In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity. . . ."

"It may safely be received as an axiom in our political system, that the *State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. . . .*" (Emphasis supplied)

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

". . . the powers proposed to be lodged in the federal government are as little formidable to those

reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded, of a meditated and consequential annihilation of the State governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them."

The Federalist, (Modern Library, Random House) Nos. 14, page 82; 28, page 174; 45, page 303; 46, page 312.

In 1791, despite Hamilton's argument that bills of right are stipulations between kings and their subjects and have no application to a constitution founded upon the power of the people, (The Federalist, No. 84), the very first Congress under Madison's leadership, adopted the first ten amendments to guard the individual against the omnipotent power of the federal government.

It is significant for the disposition of the case at bar that Madison, who feared the power of the legislative branch of government[1] attempted to get Congress

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[1] ". . . The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetous vortex." ". . . they seem never for a moment to have turned their eyes from the danger to liberty from the *overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority* . . . In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a de-

to pass, along with the ten amendments, Proposition No. XIV which required the states to provide trial by jury. Proposition XIV was rejected by Congress at the same time that it accepted the first ten amendments. See Brennen, Bill of Rights and the States, 36 N.Y. University, L.Rev. 773. This was a judgment by Congress that trial by jury in state court is not indispensable to liberty and justice.

Nevertheless, the adoption of the Fourteenth Amendment, after the Civil War, gave new grist for the mills of those who would place all of the same limitations on local state government as are placed

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mocracy, where a multitude of people exercise in person the legislative functions, and are continually exposed by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments." The Federalist, No. 48.

on the distant all powerful federal government by the Bill of Rights.

In 1873 this Court again answered the argument in a manner favorable to maintaining state power unfettered by federal standards. *Slaughterhouse Cases*, 83 U.S. 36.

The Court held that the privileges and immunities of National citizenship are different from those of state citizenship and that the privileges and immunities clause of the Fourteenth Amendment does not make the privileges and immunities of national citizenship, as set forth in the Bill of Rights, applicable to state citizenship; nor does the due process clause of the Fourteenth Amendment incorporate the entire Bill of Rights as fundamental to life, liberty, or property. With reference to the "privileges and immunities" argument, the Court stated:

> "... Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights, which we have mentioned, from the state to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?
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> "All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of

> Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects . . ." 176 U.S. at 589.

The holding of the *Slaughterhouse Cases, supra,* as to the privileges and immunities clause of the Fourteenth Amendment has never been changed and is still the rule of law. However, as to the due process clause, certain rights enumerated in the Bill of Rights have been held in subsequent decisions, hereinafter discussed, to be fundamental to liberty and consequently applicable to the States. See *Smith* (President-elect of the A.B.A., 1962), *What has Happened to the Tenth Amendment,* 10 Louisiana Bar Journal 21, 29-32 (1962); *Beth, The Slaughterhouse Cases Revisited,* 23 La. Law Review, 487 (1963) wherein the author states at pages 496 and 500:

> ". . . The Slaughter-House Cases have left a legacy which is of great importance, as the dispute between the majority and the dissenters in *Adamson v. California* illustrates. For in Adamson Justice Black was arguing, in substance, that Miller, the organ of the Court, had been wrong (he was writing that non-existent 1873 concurring opinion) and that the Slaughter-House precedent should be disregarded. Frankfurter, on the contrary, stood squarely behind what had become the "traditional" interpretation of the fourteenth amendment. For it has always been assumed by later Court majorities that Miller's construction

of the citizenship clause was correct. Consequently, it is still true today that the rights of persons as state citizens are in some respects different from their rights as national citizens. This is conspicuously true of the right to obtain due process from police and courts; the rule of *Palko v. Connecticut*, elucidated by Justice Cardozo to justify the Court's refusal to apply the double jeopardy rule to the states, is based on this distinction, and it is this that Frankfurter was defending. In this respect, then, Miller was successful in imposing his view of the fourteenth amendment on the future."

". . . Although the Court has in later times given the fourteenth amendment much more meaning than Miller would have wished, it has never gone all the way. By maintaining Miller's basic distinction between state and national citizenship it has given itself the power to choose which individual rights are fundamental enough to claim legitimate cover of the amendment, and which are not. This is the aspect of the Slaughter-House legacy which the dissenters in the Adamson case tried unsuccessfully to reverse."

In 1880 in *Missouri v. Lewis*, 101 U.S. 22, this Court affirmed its position that the Fourteenth Amendment does not compel uniformity in state procedure and does not prevent any state from adopting any system of laws or judicature that it sees fit for all or part of its territory.

"The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great di-

versities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled, and another part has but a few inhabitants, it may be desirable to have different systems of judicature for the two portions; trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State Government if it could not, in its discretion, provide for these various exigencies.

"If a Mexican State should be acquired by treaty and added to an adjoining State or part of a State, in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any

fair construction of the 14th Amendment." 101 U.S. at 33.

In 1875 in *Walker v. Sauvinet*, 92 U.S. 90, this court held that trial by jury in suits at common law is not a privilege or immunity belonging to a person as a citizen of the United States and is therefore not protected by the Fourteenth Amendment. The Court pointed out, citing *Edward v. Elliott*, 21 Wall 532, that it has often been held that the seventh amendment relates only to Federal Courts and that the states are left to regulate trials in their own courts in their own way. "A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee v. Hoboken Land and Import Co.*, 181 How 272, 280. Due process of law is process due according to the law of the land. *This process in the States is regulated by the law of the States*" (Emphasis supplied). 92 U.S. at 92-93. See also *Kennard v. La.*, 92 U.S. 480, 483 (1875), setting forth the requirements of procedural due process.[2]

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[2] ". . . ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement

In 1883, in *Hurtado v. California*, 110 U.S. 516, this Court held that despite the Fifth Amendment, prosecutions by a State may be instituted by information at the instance of a public officer, rather than by the indictment of a grand jury. In the Hurtado case the accused maintained that the phrase "due process of law" was equivalent to "law of the land", as found in the 29th chapter of *Magna Charta;* and that by immemorial usage it had acquired a fixed and technical meaning and necessarily included the identical institutions which had crossed the Atlantic with the colonists and were transplanted from England and established in the fundamental laws of this country. In a thorough and scholarly opinion the Court discussed the common law, the institutes of Lord Coke and the *Magna Charta,* stating that the interpretation usually put upon Lord Coke's commentary of chapter 29 of the *Magna Charta* (2 INST. 46) was too large; that the phrase, "*Nisi per legale judicium parium suorum vel per legem terrae,*" meant but by the judgment of his peers, or by some other legal process or proceeding adapted by law to the nature of the case (citing Reeve, 2 History of Eng. Law, 43); that "due process

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of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the Act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted and, upon his appeal, in the highest court of the state."

of law" means law in its regular course of administration through courts of justice (citing, Kent, 2 Com., 13); that the words "*nisi per legale judicium parium*" had no reference to a jury but applied only to the *pares regni* who were the constitutional judges in the Court of Exchequer and *coram rege* (citing Bac. Abr. Juries, 7th Ed. Lond., n. Reeve, H. L. 41); that the accusation of the primitive grand jury was practically equivalent to a conviction, subject to a chance of a favorable termination of the ordeal by water; and that it was best not to go too far back into antiquity for the best securities of our liberties. Pointing out that it made more sense that liberty was preserved and developed by a progressive growth and wise adaptation to new circumstances of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government, the Court stated the following:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many Nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the Roman Empire as the foundation of modern civilization in Europe, and

which has given us that fundamental maxim of distributive justice, *Suum cuique tribuere.* There is nothing in *Magna Charta,* rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.

"The concessions of *Magna Charta* were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary Acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to *Lord* Coke in *Bonham's. Case,* 8 Coke, 115, 118 *a,* the omnipotence of Parliament over the common law was absolute, even against common right and reason.

. . .

"Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the

> ancient customary English law, they must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty and property." 110 U.S. at p. 237. Cf. 3 Churchill, A History of the English Speaking Peoples, the Age of Revolution, pp. 146-147 (Dodd Mead & Co. 1957)

In 1887, in *Spies v. Illinois*, 123 U.S. 131, this Court once again answered the argument that the Fourteenth Amendment made all the restrictions of the Bill of Rights applicable to the State as well as the federal government, as follows:

> "That the first ten Articles of Amendment were not intended to limit the powers of the state government in respect to their own people, but to operate on the National Government alone was decided more than a half century ago, and that decision has been steadily adhered to since". (Citations omitted) 123 U.S. at 166.

In 1899 in *Brown v. New Jersey*, 175 U.S. 172, this Court held that a struck jury, in a State prosecution for murder, although unknown to the common law, was an impartial jury; that impartiality was all that due process required and that defendant was not deprived of due process of law. The Court stated the following:

> "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on Federal Government (citing cases). The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to

the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution (citing cases). The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated by only an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding." *Missouri v. Lewis*, 101 U.S. 22, 31.

"The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information." *Hurtado v. California*, 110 U.S. 516

The Court then cites with approval, the definition of due process in the *Hurtado case, supra:*

"Any legal proceeding enforced by public authority whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice must be held to be due process of law"

The Court also approved the definition of due process in *Leeper v. Texas*, 139 U.S. 462, 468:

> "Law in the regular course of administration through courts of justice is due process and when secured by the law of the State the constitutional requirement is satisfied" 175 U.S. at 174.

In the same year, 1899, this Court decided *Maxwell v. Dow*, 176 U.S. 581, which was a state prosecution by information for robbery. The accused launched a two-pronged attack under the Fourteenth Amendment, urging (1) that indictment by a grand jury and trial by a twelve-man unanimous jury was a right of national citizenship under the Fifth and Sixth Amendments and by virtue of the privileges and immunities clause of the Fourteenth and could not be abridged by the State, and (2) that indictment by a grand jury and trial by a twelve man unanimous jury were essential to liberty under the due process clause of the Fourteenth. The Court disposed of the first contention on the authority of *The Slaughter-house Cases, supra*, holding that:

> "the privileges and immunities of citizens of the United States do not *necessarily* include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government". 176 U.S. at 598.

and that the provision for a grand or petit jury in a state criminal prosecution was neither included among the rights of national citizenship nor a fundamental right of state citizenship. In disposing of accused's second contention under the due process clause, the

Court held that trial by jury was not a fundamental right, following the *Hurdado case, supra.* See 176 U.S. at 602. "In our opinion", stated the court, "the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a trial by a petit jury of the number fixed by common law . . . Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado* case is a trial by jury mentioned as a necessary part of such process . . . The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in my opinion, open to either of these objections." 176 U.S. at 603, 605. Thus the majority opinion again rejected the theory that simply because a constitutional right exists limiting the federal government, it *necessarily* creates a limitation on the States. In order to be applicable to the states such a right must be determined to be essential to life, liberty, or property. The only dissent, by Mr. Justice Harlan, is pitched primarily on the privileges and immunities clause and is strikingly similar to the dissents in later case of *Adamson v. California*, 332 U.S. at 71. It was Mr. Justice Harlan's premise that the privileges and immunities clause of the Fourteenth Amendment encompassed all of the first ten amendments, that the court could not pick

and choose among them to determine which were fundamental and which were not under the due process clause, and that "there is no middle position." 176 U.S. at 616.

Consequently, in *Maxwell v. Dow, supra*, we find the identical arguments propounded and decided as are presented in the case at bar.

The rationale of the Court in *Maxwell v. Dow* is still valid today. The Court based its decision on a determination that a trial by a petit jury, like a presentment by a grand jury is not such a fundamental right that a fair trial is impossible without it. This is the same test used by this Court in later cases in determining whether a right is so fundamental and essential that a fair trial cannot be had without it. See *Washington v. Texas*, 388 U.S. at 17-18.

In 1903, in *Hawaii v. Mankiki*, 190 U.S. 197 (1903) this court based its decision upon the ground that indictment by grand jury and trial by petit jury were not fundamental in their nature but concerned merely a method of procedure, and that sixty years of a practice contrary to the Sixth Amendment in the Hawaiian Islands had been shown to be suited to the conditions of the islands as well as calculated to conserve the rights of its citizens.

In 1903, this Court decided *West v. Louisiana*, 194 U.S. 258, which involved a conviction for larceny in the Criminal District Court of Orleans Parish on April 4, 1902. Article 9 of the 1898 Constitution of Louisiana was in effect at the time of the subject

prosecution. Article 9 provides for a speedy public trial by an impartial jury except where the penalty was not necessarily imprisonment at hard labor or death; and further provided that the latter case should be tried by a court without a jury, or by a jury of less than twelve in number as provided elsewhere in the Constitution. Article 9 further provided the right of confrontation, and assistance of counsel and compulsory process. At a preliminary hearing before a committing magistrate, in the presence of Defendant and his counsel, a witness was produced, examined orally and cross-examined by Defendant's counsel. However, on the trial of the case, the witness being absent from the state, the District Attorney read the testimony of the witness. This procedure was objected to by the Defendant on the ground that it violated the Louisiana Criminal Act,[3] Article 9 of the Louisiana Constitution of 1898, and the Sixth and Fourteenth Amendments of the Federal Constitution. The question presented for decision by this Court was whether the admission of the deposition taken at the *preliminary* hearing deprived the Defendant of due process under the Fourteenth Amendment and of his right to be confronted by the witness against him. The Defendant's contention was that due process was violated because

[3]The Act of 1805 provided "All criminal offenses and misdemeanors shall be construed according to the common law of England and forms of indictment, method of trial, rules of evidence and all other proceedings in the prosecution of crimes, offenses and misdemeanors, changing what ought to be changed, shall be according to the common law, *unless otherwise provided.*" (Emphasis supplied)

at common law the right to read a deposition upon a defendant's trial did not exist if a witness was absent, but existed only if the witness was dead, insane or ill. This Court, answering the Defendant's argument, stated that in order to find due process lacking, it must find that the Court's refusal to exclude the deposition took away "a right of such an important and fundamental character as to deprive them of their liberty without due process of law". The Court further stated, 194 U.S. at 262-263:

> "The State of Louisiana had the right to alter the common law at any time, although it had heretofore adopted it with certain limitations . . . The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at common law . . ."
>
> "Coming to a decision of the question before us, we are of the opinion that no Federal right of the plaintiff in error was violated by admitting this deposition in evidence.
>
> "Its admission was but a slight extension of the rule of common law even as contended by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law. It is neither so unreasonable nor improper as to substantially affect the rights of an accused party or to fundamentally impair those general rights which are secured by the Fourteenth Amendment."

Once again it is seen that way back in 1903 this Court understood that the question of due process under the Fourteenth Amendment involved the test of

the deprivation of a fundamental right and that this test, as contended by Defendant in the case at bar, is not some new discovery made by this Court in its recent decisions.

In 1921, in *Ownbey v. Morgan*, 256 U.S. 94, this court stated:

> "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings."

In 1927, Justice Holmes, denying an application for Habeas Corpus in the Sacco and VanZetti cases was reported in the New York Times, August 21, 1927 as stating:

> "The essential fact of record that is relied upon is that the question of Judge Thayer's prejudice, raised, and it is said, discovered only after the trial and verdict, was left to Judge Thayer and not to another judge. But, as I put it to counsel, *if the Constitution of Massachusetts had provided that a trial before a single judge should be final without appeal, it would have been consistent with the Constitution of the United States.*" (Emphasis supplied)

In 1928 in *Dugan v. Ohio*, 277 U.S. 61, this Court

affirmed a conviction for violation of liquor laws. The Defendant was tried by the Mayor of an Ohio City without a jury.

In 1930 in *Coler v. Corn Exchange Bank*, 250 N.Y. 136, affirmed 280 U.S. 218 the Court stated the following:

> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike."

In 1932 in *Powell v. Alabama*, 287 U.S. 45, this Court discussing procedural due process under the Fourteenth Amendment, stated as follows:

> "One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, *subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation . . .*" (Emphasis supplied)

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. (*Hebert v. Louisiana*, 272 U.S. 312, 316), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due

process clause of the Fourteenth Amendment, *although it be specifically dealt with in another part of the Federal Constitution.*" (Emphasis supplied)

"It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law . . .

"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . ."

In 1934 in *Snyder v. Massachusetts*, 291 U.S. 97, the Court affirmed a conviction for murder, although the accused had not been permitted to accompany the jury to view the site of the crime. As stated by Justice Cardozo:

"Consistent with that amendment (the Fourteenth) trial by jury may be abolished". 291 U.S. at 105.

The rationale of the decision was whether the right contended for has a substantial relation to the defendant's right to defend himself against the charge.

In 1937 in *Palko v. Connecticut*, 302 U.S. 319, Mr. Justice Cardozo stated the following for this Court:

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado v. California*, 110 U.S. 516; *Gaines v. Washington*, 277 U.S. 81, 86 . . . The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker v. Sauvinet*, 92 U.S. 90; *Maxwell v. Dow*, 176 U.S. 581; *New York Central R. Co. v. White*, 243 U.S. 188, 208; *Wagner Electric Co. v. Lyndon*, 262 U.S. 226, 232 . . .

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress. . . .

The line of division may seem to be waver-

ing and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. *The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, supra,* p. 105; *Brown v. Mississippi, supra,* p. 285; *Hebert v. Louisiana,* 272 U.S. 312, 316. *Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. . . .*

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. *If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. Twining v. New Jersey, supra,* p. 99. This is true, for illustration, of *freedom of thought and speech.* Of that freedom one may say that it *is the matrix, the indispensable condition, of nearly every other form of freedom.* With rare aberations a pervasive recognition of that truth can be traced in our

history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once the notion was abandoned, as long ago it was that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. Cf. *Near v. Minnesota, supra; De Jonge v. Oregon, supra.* Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott v. McNeal*, 154 U.S. 34; *Blackmer v. United States*, 284 U.S. 421. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore v. Dempsey*, 261 U.S. 86; *Mooney v. Holohan*, 294 U.S. 103. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell v. Alabama, supra*, pp. 67, 68. *The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.*

Our survey of the cases serves, we think, to justify the statement that the dividing line be-

tween them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him *a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? Hebert v. Louisiana, supra.* The answer surely must be "no." *What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider.* We deal with the statute before us and no other. . . ." (Emphasis Supplied)

From the above quotations it is perfectly clear that the test used by this Court in the Palko decision for determining procedural due process is identical with that used by this Court in its most recent decisions: those privileges enunciated in the Bill of Rights which have been applied to the States, are so applied only because neither liberty nor justice would exist if they were sacrificed and, with reference to a criminal prosecution, such rights were essential to a fair hearing. Therefore, the rationale of Justice Cardozo's Palko decision is very much alive today.

Since the Palko decision was decided in 1937, under the due process clause, there has been "a developing distinction between fundamental and non-fundamental rights which could be adapted to the conditions

of time and place as Cardozo attempted to do in his Palko opinion." Beth, The Slaughterhouse Cases Revisited, 23 La. Law Review, 487, 503 (1963). See *The Adamson Case, A Study in Constitutional Technique*, 58 Yale L. J. 268, (1949) as supporting the *Palko* doctrine of "those guarantees implicit in the concept of ordered liberty" and the due process clause as a flexible concept of fundamental fairness.

It has long been established by this Court that a right to a fair trial is protected by the due process clause of the Fourteenth Amendment. *Moore v. Dempey*, 261 U. S. 86, 91; *Chambers v. Florida*, 309 U.S. 227, 238; *Buchalter v. New York*, 319 U. S. 427.

The guarantees of the Sixth Amendment which have been applied to the States in this Court's more recent decisions have been applied not because they are found in the Sixth Amendment, but because they are essential to a fair trial, and a fair trial is protected by the due process clause of the Fourteenth. It is true that in some of this Court's more recent decisions, loose language was used which could be interpreted to mean that the Sixth Amendment applies directly and mechanically to the States through the Fourteenth, but such language is just a gloss through which the primary principle decided by the case shines; the right decreed to be binding on the States is implicit in due process because a fair trial would be impossible without it.

Thus, in *Gideon v. Wainwright*, 372 U. S. 342, this

Court held that a fair trial, at least in a felony prosecution, necessarily includes the right to be represented by counsel, and that an indigent defendant must be afforded counsel by the state.

> "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him . . .
>
> 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel'." 372 U.S. at 344.

In *In re Oliver*, 333 U.S. 257 (1948), which involved the Michigan one man grand jury-judge, this Court determined that a fair trial was impossible if held in secret and without reasonable notice, opportunity to cross-examine opposing witnesses and opportunity to consult counsel.[4]

In *Pointer v. State of Texas*, 380 U. S. 400 (1965), the use of a deposition taken at a preliminary hearing at which petitioner was not afforded the right of cross examination was held to be violative of due pro-

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[4]Perhaps the following remark of Mr. Justice Rutledge, one of the four dissenters in *Adamson v. California*, 332 U.S. 46, gives insight into the thinking of those who would apply all of the Bill of Rights to the States: "It was good enough for our fathers. I think it should be good enough for this Court and the States." Dissenting opinion of Rutledge, J., *In Re Oliver*, 333 U.S. at 282.

cess because the opportunity of cross-examination of opposing witnesses is essential to a fair trial[5].

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[5]Inasmuch as Justice Black, the organ of the Court, is committed to the proposition that the Fourteenth Amendment's Due Process Clause incorporates all of the Bill of Rights, it is not surprising to find dicta in the opinion indicating that the Sixth Amendment applies directly to the States. See Justices Harlan's and Stewart's concurring opinions, 380 U.S. at 408-410. See Justice Black's dissenting opinions in *Adamson v. California*, 332 U.S. at 71-72; Cf. *Green v. U.S.* 356 U.S. 165 at 193.

Let us examine the claim set forth in Justice Black's dissent in the Adamson case that it was the intent of Congress to include the entire Bill of Rights in the Fourteenth Amendment, because Congressman John Bingham was responsible for its form and intended that the Bill of Rights be made binding on the States. It has been pointed out elsewhere than in Justice Black's dissent, that Bingham was one of the "Black Republicans" whose desire to wreck vengeance on the defeated South, motivated him rather than any desire to promote personal liberty. See Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 Yale L. J. 371, 392 (1938). It has also been stated that Bingham, like all good abolitionists, distrusted the Supreme Court and regarded the Fourteenth Amendment as a weapon for legislative rather than judicial action against the States; that, as a railroad lawyer, he was a strong proponent of economic laissez-faire and sympathetic to the view of due process giving the Supreme Court power to interfere with state economic regulation (contrary to the views held by Justice Black); and that there is nothing in what Bingham or anyone else said to suggest that the Fourteenth Amendment was intended exclusively as a shorthand reference to the Bill of Rights. See *The Adamson Case: A Study in Constitutional Technique*, 58 Yale L. J. 268 (1949).

But even if the intent which Justice Black imputes to Bingham has a limited validity, it is illogical to equate the intent of one man with a project like a constitutional amendment which requires the acquiescence of Congress and the States.

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal . . . A major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him . . . The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine". 380 U.S. at 405, 406-407, Cf. *West v. Louisiana*, 194 U.S. 258.

In *Klopfer v. North Carolina*, 386 U.S. 213 (1966) the public prosecutor refused to bring petitioner's case to trial, and without any justification kept an indictment pending against him like the "Sword of Damocles". Pointing out that during this indefinite period, while petitioner was under indictment due to the arbitrary action of the prosecutor, he was subject to public scorn and his speech, associations and employment were curtailed, the court concluded that petitioner's liberty had been materially limited by the undue delay in trial and that since the prosecutor's action was unjustified, petitioner had

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See *Maxwell v. Dow, supra*, 176 U. S. at 601; *The Adamson Case, supra*, 58 Yale L. J. 268; Deutsch, *Civil Law Influences on the Development of Civil Liberties*, 12 Tulane Law Review 331 (1938).

thereby been deprived of his liberty without due process of law.

Klopfer merely reiterates the obvious principle that due process is denied when a defendant's rights are materially injured by the prosecutor's undue delay. The Court's discussion of the Sixth Amendment's right to a speedy trial was entirely unnecessary. See concurring opinion of Justice Harlan 87 Sup. Court at 994.

In a recent decision, *Washington v. Texas*, 388 U.S. 14 (1967), this Court determined that the right of an accused to have compulsory process for obtaining witnesses in his favor is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause.

> "The right to offer the testimony of witnesses and to compel their attendance if necessary is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process". 87 Supreme Court at 1923.

Clearly, the *Washington supra*, decision, is based on the essential nature of compulsory process in obtaining a fair trial, and the necessity of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment. Again, the Court's discussion

of the Sixth Amendment right of compulsory process is unnecessary to the decision. See concurring opinion of Justice Harlan, 87 S. Ct. at 1925.

Parker v. Gladden, 385, U.S. 363 (1966) (statements by bailiffs overheard by jurors) and *Irwin v. Dowd*, 366 U.S. 717 (1961), (too much adverse publicity), cited by appellant as indicating that this Court has already held the jury trial right applicable to the States, were concerned with the impartiality of the jury and rights of confrontation and cross-examination and did not involve the question whether the Fourteenth Amendment requires a State to accord a jury trial in all criminal prosecutions. The question presented in both cases went to the *nature* of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord. See *Turner v. Louisiana*, 379 U.S. 466 (1965). Indeed in *Irwin v. Dowd, supra*, quoted by appellant as support for his theory of the essential nature of jury trial, this Court was pointing out the *value* of jury trial, but at the same time acknowledging that it is *not required as an essential of due process* under the Fourteenth Amendment. *U.S. v. Maroney*, 355 F. 2d at 315, also cited by appellant, in the concurring opinion, points out that no right to trial by jury exists in state court by explicit ruling of the United States Supreme Court.

It does not follow that because some provisions of the Bill of Rights have been found essential to liberty

and justice; that all should be mechanically applied to the States.[6] Although some individual justices have

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[6]The Fourth, Fifth, and Eighth Amendment decisions cited by Appellant (*Ker v. California; Aguilar v. Texas; Mapp v. Ohio; Malloy v. Hogan;* and *Robinson v. California*) represent no more than extensions of the Palko doctrine of "ordered liberty" under the Fourteenth Amendment which prohibits state action which shocks the conscience. See Wolbrette, Detention for Questioning in Louisiana, 39 Tulane Law Review 69 (1964). The Fourth and Fifth Amendment case deal with the rights of privacy of persons or premises, including the right to resist unauthorized entry which has as its purpose the obtaining of information which can be used to effect a further deprivation of live, liberty, or property; the dignity of man which includes his right not to be convicted out of his own mouth; and the "deep-rooted feeling that the police must obey the law while enforcing the law". *Jackson v. Denno,* 378 U.S. at 386 (1964). "Four rationales have been said by the Supreme Court to underlie the exclusionary rule in search and seizure cases; providing the victim with an effective remedy; preventing the government from profiting by its own wrong; preserving the integrity of the court; and deterring the police from future misconduct". Orfield, Searches and Seizures in Federal Criminal Cases, 24 Louisiana Law Review 665 (1964). These reasons apply also to the exclusionary rule in self-incrimination cases. However, none of these rights or reasons has any bearing on the question whether trial by jury is fundamental to liberty and justice. The Fifth Amendment right to a grand jury indictment for an infamous crime, however, has always been treated as a right comparable to trial by jury. Blackstone points out that the grand jury in England served as a barrier between king and subject, assuring the subject against official persecution and groundless accusations. See 4 Blackstone Commentaries 303; Hale, Farewell to Grand Juries, 50 American Bar Association Journal 744 (1964); *Stirone v. U.S.,* 361 U.S. 212; *Green v. U.S.,* 356 U.S. 165. This Court has consistently held that indictment under the Fifth Amendment is not a due process right applicable to the states under the Fourteenth. See *Hurtado v. California,* 110 U.S. 516.

held such an opinion, a majority of this Court has never held that the Bill of Rights apply directly to the states through the Due Process Clause of the Fourteenth Amendment. This Court has never found a guarantee of the Bill of Rights applicable to the States without first determining that the particular guarantee is essential to liberty and justice. See Corwin, The Constitution and What it Means Today, (1958) p. 250; Cooley, Constitutional Limitations, p. 67.

> "If the Court should ever arrive at the point, either directly or by indirection, of declaring that the entire Bill of Rights is to be regarded as applicable to the States through the Fourteenth Amendment, the result would be a 'can of worms' of difficulties that would almost defy adequate solution. State cases without number could be reopened. Criminal cases where the convicted person had not been brought to trial by grand jury indictment would line up alongside civil cases where a jury trial has been denied. Under the present arrangement, conduct that 'shocks the conscience' is voided, but in other matters that lack a 'fundamental character' the states are left free. This freedom of the states also has the salutory effect of encouraging experimentation. Justice should not be static. Improvement and greater efficiency should always be sought if basic justice is to be preserved." Bartholomew, The Gitlow Doctrine Down to Date, 50 Am. Bar Assn. Journal 139, 141 (1964).

It might be argued that the wholesale application of the Bill of Rights provides certainty by standardizing this Court's protection of personal liberties, but

the result, as has been pointed out by legal commentators, would stifle reform in the administration of justice, imposing overly rigid and burdensome restrictions on state criminal procedure, and thus invalidating a large number of current state practices, including instituting prosecutions by information instead of indictment, the modification of the twelve man petit jury, and the practice of trying common law suits involving more than twenty dollars without a jury. See *The Adamson Case, supra*, 58 Yale L. J. 268 (1949); Note, 96 U. of Pa. L. Rev. 272 (1947)

The President's Commission on Law Enforcement and Administration of Justice in *The Challenge of Crime In A Free Society*, stated that criminal administration is primarily a state and local responsibility, and further stated the following:

> "The system of criminal justice America uses to deal with those crimes it cannot prevent and those criminals it cannot deter is not a monolithic, or even a consistent system. It was not designed or built in one piece at one time. Its philosophic core is that a person may be punished by the Government if, and only if, it has been proved by an impartial and deliberate process that he has violated a specific law. Around that core layer upon layer of institutions and procedures, some carefully constructed and some improvised, some inspired by principle and some by expediency, have accumulated. . . . The entire system represents an adaptation of the English common law to America's peculiar structure of government, which allows each local community to construct institutions that fill its special needs. Every vil-

lage, town, county, city, and State has its own criminal justice system, and there is a Federal one as well. All of them operate somewhat alike. No two of them operate precisely alike . . ."

The Federalist, No. 17, (Hamilton) also emphasizes that the administration of criminal justice belongs to our states:

"There is one transcendent advantage belonging to the province of the State governments . . . I mean the ordinary administration of criminal and civil justice."

The extended discussion hereinabove has been made necessary because of the gloss which has been placed on the fundamental meaning of the Fourteenth Amendment's due process clause by such gratuitous pronouncements as:

". . . we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law." *Washington v. Texas*, 388 U.S. at 18)

and

"the fact that right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that (it is) a fundamental right essential to a fair trial." (*Pointer v. Texas*, 380 U.S. at 404)

An examination of the cases hereinabove discussed shows the following:

(1) The view prevailing prior to the adoption of the Fourteenth Amendment was that the Bill of Rights was adopted as a restraint on

the federal government and applied exclusively to it.

(2) After the adoption of the Fourteenth Amendment, it has been uniformly held that the privileges and immunities clause does not make the entire Bill of Rights applicable to the States, but that the due process clause prohibits the States from abridging any right which is fundamental to liberty and justice.

(3) The extreme position of certain dissenting justices, that the first section of the Fourteenth Amendment necessarily incorporates all of the Bill of Rights has been rejected time and time again.

It is submitted that the due process clause does not necessarily or even presumptively include a right merely because it appears in the Bill of Rights. The test is whether the right is essential to liberty and justice, and, in the case at bar, whether the claimed right of jury trial is essential to a fair trial. This has been the rationale of this Court since the *Hurtado* and *Maxwell decisions, supra,* and it is the rationale of the latest decisions in this field.

Hopefully, the desire for uniformity throughout the nation in the administration of justice in spite of local differences that exist, and in spite of the long line of decisions denying the mechanical application of the entire Bill of Rights to the States, will not lead to the adoption of the extreme view repeatedly rejected since the Slaughterhouse Cases.

On the subject of the danger of compelled uni-

formity, one of the four dissenting justices in *Malloy v. Hogan*, 378 U.S. 1, 24 (1964), accused the majority of compelling uniformity between state and federal criminal law enforcement, thus unduly restricting the power of the states to deal with local crime and bringing this nation "closer to the monolithic society which our federalism rejects."

It is most respectfully submitted that while it might be argued that compelled uniformity makes for convenience and efficiency in the administration of justice, it is fatal to liberty, and foreign to the principles which constitute the fabric of our society.

C. THE DIRECT APPLICATION TO THE STATES OF THE SIXTH AMENDMENT JURY TRIAL RIGHT WOULD REQUIRE THE VERDICT OF A UNANIMOUS TWELVE MAN JURY FOR A CONVICTION IN STATE COURT.

In *American Publishing Company v. Fisher*, 166 U.S., 464 (1897) and in *Springville v. Thompson*, 166 U.S. 707 (1897) this court held that because the right to trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be a unanimous verdict of twelve jurors in all federal courts where a jury trial is held.

In *Thompson v. Utah*, 170 U.S. 343 (1897) this court held that Utah, being a territory at the time that the crime of which the defendant was accused was committed, its courts were under the exclusive jurisdiction of the United States, and the Sixth Amendment applied directly and required a unanimous

twelve man jury to convict. The court reasoned that the jury referred to in the original Constitution and the Sixth Amendment is a jury constituted as it was at common law of twelve persons requiring a unanimous verdict.

In *Patton v. United States*, 281 U.S. 276, 288 (1929) this court held that the Sixth Amendment trial by jury means a trial by jury as understood and applied at common law and includes the following essential elements: 1. All juries to consist of twelve men; 2. Trial to be in the presence and under the superintendence of the judge having power to instruct the jury as to the law and advise them in respect of the facts; 3. Verdict must be unanimous.

In *Andres v. United States*, 333 U. S. 740, 748 (1948) this court stated "Unanimity in jury verdicts is required when the Sixth and Seventh Amendments apply".

In *Singer v. United States*, 380 U. S. 24 (1965) this Court pointed out that *Thompson v. Utah*, *supra*, and *Schick v. United States*, 195 U. S. 65, have been construed together as establishing the rule that in all but petty offenses, conviction by a twelve man unanimous jury was compelled by the Sixth Amendment in federal prosecutions.

In *Singer v. United States*, *supra*, this Court further held that under the Sixth Amendment[7] there

[7] "We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that

is no federally recognized right to a criminal trial before a judge sitting alone, but that a defendant may waive his right to trial by jury provided that the prosecuting attorney and trial judge consent.[8] The Court in its opinion recognized that the states have adopted a variety of procedures relating to waiver of jury trials in state criminal cases, noting several states where waiver is a matter solely within the defendant's discretion. 380 U. S. at 36-37.

Therefore, if the rigid federal jury trial standards are fastened on the states under the Sixth Amendment, as they must be if the Sixth Amendment jury trial right is held to apply directly to the states, the following will result:

1. Convictions under state laws providing for less than twelve man juries and/or less than unanimous verdicts will be unconstitutional.

2. State determinations of what constitutes a petty state offense so as to be excepted from the Sixth Amendment requirement of conviction by a twelve man unanimous jury, will be subject to the federal definition of a petty crime. This would affect such crimes as reck-

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the Government's insistence on trial by jury would result in the denial to the defendant of an impartial trial . . . petitioner gave no reason for wanting to forego jury trial other than to save time". *Singer v. U.S. 380 U.S. at 37.* The Court is undoubtedly referring to due process under the Fifth Amendment.

[8]Rule 23 (a) Federal Rules of Criminal Procedure.

less or drunken driving, which in many state jurisdictions are considered not of a sufficiently serious nature to warrant trial by jury.[9]

The federal view is that reckless or drunken driving involves a crime of such a serious nature that trial by jury is required to convict one accused of such a crime in federal court. *District of Columbia v. Colts*, 282 U. S. 63 (1930).

3. State procedure for waiver of jury trial, which varies considerably from state to state, some states not allowing waiver of jury trial at all in capital cases (as in Louisiana) and other states allowing the defendant to waive jury trial without the state's consent, would be subject to the rigid procedure followed in federal court.

On the other hand, if the right to trial by jury is to be determined not with reference to the Sixth Amendment, but only with reference to whether it is a necessary element of a fair trial under the due process clause of the Fourteenth Amendment, it would not be necessary to encase jury trials in state courts in the rigid mold of the Sixth Amendment jurisprudence.

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[9]Florida—*State v. Parker*, 87 Fla. 181, 100 So. 260; *Metropolitan Court v. Bishop*, 190 So. 2d 366; Nebraska—*State v. Amick*, 173 Neb. 770, 114 N.W. 2d 893; *State v. Lookabill*, 176 Neb. 254,125 N.W. 2d 695; New Jersey—*State v. Rodgers*, 91 N.J. L 212,102 A433; *Caruso v. Porter*, 102 N.J. L 71, 130 A805; *Latimer v. Wilson*, 103 N.J. L 159, 134 A750; New Mexico—*Hamilton v. Walker*, 65 N.M. 470, 340 P 2d 407.

Indeed, what is so fundamental to fairness about a twelve man unanimous jury?[10] It has been stated by legal commentators and historians that the number 12 was chosen in analogy to the twelve prophets and twelve deciples; or possibly the twelve stones referred to in Bible history; and the institution of twelve judges selected in ancient days to try matters of law are stated to be a possible precedent. Additionally there might be mentioned the Roman Code of the twelve tables and the fact that among Scandinavian nations twelve was a favorite number for constituting a court. Some legal scholars believe that the number twelve was adopted among the Anglo-Saxon and Normans from the twelve witnesses whom they believe sufficient to establish the credibility of a party to a transaction. It has even been suggested that the "twelve men good and true" represent the twelve Apostles and are divinely endowed with a unique fact finding ability. See Robert Moschzisker Trial by Jury (1922), pages 290-291; Silving Essays on Criminal Procedure, (Dennis and Co. 1964) page 53.

Jeremy Bentham said "Antiquity of the law is not reason. The antiquity of a law may create a prejudice in its favour, but it is not a reason of itself . . ." "Arbitrary definition is not reason. Nothing is more common among jurists and political writers than to

[10]Osborn, a document specialist after more than twenty five years observing jury trials throughout the United States, observed in *The Mind of the Juror* (Boyd Printing Company 1938) that jury fixers know that whenever the requirements of a unanimous twelve man verdict exists, it is necessary to reach only one juror in order to defeat justice.

build up theories, and even to construct huge works upon definitions that are purely arbitrary". Dumont's Bentham, *Principles of Legislation*, translated by John Neal (1830), pages 286, 287.

Neither antiquity nor arbitrary definition constitute any reason for holding that the unanimous agreement of an arbitrary number of twelve men, possibly based on superstition, is the only method of producing a fair finding of fact.

The absurdity that results from relying on ancient forms of the common law trial by jury is illustrated in a recent state criminal proceeding in Baton Rouge, Louisiana, reported in the Baton Rouge Morning Advocate of November 17, 1967. In that case the accused argued that if the word "peers" is defined as "persons of the same rank or standing" a nineteen year old defendant should be tried before a jury composed only of nineteen year olds.

This court has not hesitated to reject the English common law in certain instances when it did not measure up as a standard by which to determine the rights of Americans. See *Powell v. Alabama*, 287 U. S. 45, 65 (1932); (Common law right of counsel in misdemeanors but not felonies rejected); *Grosjean v. American Press Co.*, 297 U. S. 233, 249 (1936) (Common law licensing of the Press rejected); *Mallory v. Hogan*, 378 U. S. 1 (1964) (Common law rule that the admissibility of evidence is not affected by the illegality of the means through which the evidence was obtained was rejected); See Deutsch, *Civil Law*

Influences on the Development of Civil Liberties, 12 Tulane Law Review, 331 (1938); Orfield's *Searches and Seizures in Federal Criminal Cases*, 24 La. Law Review, 665, 666 (1964); *The Challenge of Crime in a Free Society*; a report by the President's Commission on Law Enforcement and Administration of Justice, page 306, note 18.

That the right to a unanimous verdict or a twelve man jury is not considered so hallowed or sacred even in England, its supposed land of birth, is seen by the English Criminal Justice Act of 1967, S.13.1:

> "In a case where there are not less than eleven jurors the jury need not be unanimous if ten of them agree, and in a case where there are ten it need not be unanimous if nine agree.
>
> A majority verdict of guilty may only be accepted if the foreman has stated in open court the number of jurors who respectively agree and dissented. A majority verdict must not be accepted unless it appears that the jury have had not less than two hours for deliberation or such longer period as the court considers reasonable having regard to the nature and complexity of the case. These provisions come into operation on 1st October 1967." Halsbury's Laws of England, Third Edition, Current Service, Issue 27 at Key No. E4388. See also Challenge of Crime in a Free Society, *op. cit. supra*, at page 307 wherein the above English law is pointed out with approval as one of the reformed measures tending to improve the administration of criminal justice.

Recently, as reported in the New York Times, an

English jury convicted an accused of murder by a 10 to 2 verdict, in accordance with the above quoted statute.

The time limitation of six months set by Congress in 18 U.S.C. Section 1, and by this Court in *Cheff v. Schackenberg, supra,* is an arbitrary figure based on expediency, having no relationship to the question of whether a fair trial is available to the accused under the Fourteenth Amendment standards. Yet the direct application to the states of the federal standard of jury trial under the Sixth Amendment would require the application of the mechanical six months' standard in every state regardless of an individual state's concept of what constitutes a minor crime.

The legacy of a holding that the Sixth Amendment Federal jury trial guarantee applies directly to the state will be uncertainty and chaos in the administration of criminal justice in those states providing for less than unanimous verdicts, in those states providing for less than twelve man juries; in those states defining minor crimes in any manner different from the federal definition; in those states providing a treatment for waiver of jury trials, different from the federal standards.

It is submitted that if this court should hold the federal Sixth Amendment jury trial right applicable to the states, it is incumbent on it, in the interest of the efficient administration of justice, to advise the states unequivocally of the status of convictions had

by less than twelve man unanimous verdicts and to delineate what crimes the states may treat as minor ones.

However, it is further submitted that the Sixth Amendment federal jury trial guarantee and the rules tailored for federal courts thereunder, should not be applied to the states; that this court's power of supervision over lower federal courts should not be extended to state criminal courts under the guise of the Sixth Amendment; and that the meaning of the Fourteenth Amendment's due process clause should not be distorted by equating it with those rules which were fashioned for the administration of criminal justice in federal courts.

D. HISTORICALLY TRIAL BY JURY WAS NOT RECOGNIZED AT COMMON LAW, BY THE FRAMERS OF THE CONSTITUTION, OR BY LOUISIANA, AS AN ESSENTIAL ELEMENT OF A FAIR TRIAL.

There is little doubt that the right of trial by jury is of ancient origin.[11] It must be noted, however, that the historical origin of the right is not at issue;

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[11] III Blackstone, *Commentaries on the Laws of England*, *349-50; IV, Blackstone, *id.* at *349; Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury", 39 Harvard Law Review, 917, 923 (1926). In Socrates' trial (about 400 B.C.) 501 jurors voted. Socrates was found guilty by a majority of only 60. See Wigmore, Panorama of the World's Legal System, pp. 291, 312-313, 839; Potter, Historical Introduction to English Law, (2.ed) p. 14; Jolowicz, Historical Introduction to Roman Law (Cambridge University Press, 1952), p. 329, 411; Plucknett, A concise History of Common Law (5th ed. 1956) p. 106.

and, although appellee in no way wishes to belittle the relevance of history or the importance of the right of jury trial, appellee is constrained to point out that the issue before this Honorable Court is the scope and extent of the right to jury trial. Appellee respectfully submits that historical references are relevant only insofar as they shed light on this issue. It further submits that any argument, premised only on the sacredness of the right to jury trial and concluding to universal application in all areas of State prosecutions, utterly fails to shed light on the issue at hand.

Appellant has proposed that trial by jury was recognized at common law and by the framers of the Constitution as an essential element of a fair trial.[12] Since fundamental fairness is the very heart of due process, appellant has alleged history proves that, where there is a trial without a jury, there is a trial without due process of law. This simply is not so. Indeed, history and the decisions of this Honorable Court clearly show that there may be fair trials without a jury.

(1) *The Common Law Experience*

Magna Carta truly was of monumental legal proportions. It set the framework for numerous rights of Englishmen and Americans. It is unfortunate, however, that some later writers have ascribed to Magna Carta all of our rights. More specifically, it is ridiculous to allege that Magna Carta proves the right of every Englishmen (and therefore every American) to have a trial by jury in any prosecution against

[12]Appellant's brief, p. 12 *et seq.*

him.[13] Indeed, Magna Carta itself placed due process (or the law of the land) [14] in juxtaposition with judgment of peers.

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[13] "That the modern institution of trial by jury derives from Magna Carta is *one of the most revered of legal fables.* The belief is an obstinate example of the 'inevitable habit of reading later ideas into earlier institutions.' *Magna Carta neither granted nor guaranteed trial by jury.* The forms of the modern jury had not taken shape by 1215, although the principles from which they were to evolve found expression after the Norman Conquest. Modern scholarship has abundantly established that the *judicium parium* of the famous chapter 39 was not our verdict on the facts of 'twelve good men and true.' It was the ancient protection of the free Norman whenever embroiled with the law, whereby his peers, and not merely a king's justice, should determine what ordeal was to test his rights and how he should perform it." (References omitted, emphasis added). Frankfurter and Corcoran, *op. cit. supra* note 11, at 922-23. See also Perry, *Sources of Our Liberties* (c. 1959) 7-8. 1 Holdsworth, A History of English Law (5th ed. 1931) pp. 59, 323; McKechnie, Magna Carta, p. 178; Seldon, Notes on Fortescue's Laudibus Legem Angliae (London) Chapter 26, p. 87; Radcliffe and Cross, The English Legal System (3rd.3d 1954), pp. 49-50, 223-226; Hayes, Baldwin and Cole, History of Europe (Revised Ed. 1956) p. 264.

[14] Regarding "the law of the land", Perry states: "Although there has been much scholarly dispute on the subject, it appears that this phrase was intended by the barons to enunciate a concept very similar to the principle found in the Fifth and Fourteenth Amendments to the Constitution of the United States that no person may be deprived of life, liberty or property without due process of law.

"As early as the fourteenth century the 'law of the land' provision was considered to be identical with the concept of 'due process of law.'" (Reference omitted). Perry, *op. cit. supra.* note 13, at 5-6. See also, Radcliffe and Cross, op. cit. supra, Note 13, at pp. 49-50, 223-226; Hand, The Bill of Rights, (Oxford University Press 1958) p. 35.

> "No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, *except by the legal judgment of his peers or by the law of the land.*" [15] (Emphasis added.)

Thus, Magna Carta guaranteed the right to freedom unless such freedom was abridged by trial of peers *or* by due process.[16] "The Great Charter did not guarantee 'trial by jury' to anyone." [17]

From the year 1215 to the year of the adoption of the Constitution of the United States, there grew up side by side, in both England and the American colonies, the tradition of right to jury trial in most serious cases and non-jury trials or summary trials in numerous instances, including some serious offenses. As to the experience in England prior to 1787, in a well documented article, the much esteemed, late Mr. Justice Frankfurter and Thomas Corcoran concluded that:

> "Down to the separation of the colonies from the mother country this summary jurisdiction of the English magistrates had three salient

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[15]Chapter 39, Magna Carta, 1215, as translated, quoted in Perry, *op. cit. supra* note 13, at 17.

[16]Of a citizen's rights under Magna Carta, Kaye states: "He was entitled to protection *either* 'by the judgment of his peers, with its requirement of unanimous condemnation from twelve laymen like himself,' *or* 'by the law of the land,' on the stability and generality of which he had theretofore been content to rely." (References omitted.) Kaye, "Petty Offenders Have No Peers," 26 Chicago Law Review 245, 247 (1959).

[17]Taylor, *Due Process of Law* (1917), at 6.

features. (1) There was a specific withdrawal from trial by jury of specific offenses in specific statutes, rather than a general formula for summary procedure. (2) There was no unifying consideration as to the type of criminal offense subjected to summary trial nor any uniformity in the number of magistrates before whom the various offenses were tried. *Although the great majority of instances were aptly characterized as 'petty' violations, some bordered closely on serious felonies and were punished with appropriate severity.* The controlling factor seems less the intrinsic gravity of the offense, judged by its danger to the community, than the desire for a swift and convenient remedy. (3) Nor was there uniformity about appeals. The earlier statutes gave no appeal. Beginning with Charles II the more serious offenses, excepting infractions of excise laws, could be retried by the justices in sessions sitting *without* a jury. But this was largely a paper privilege, for offenders with purses long enough to afford a retrial were few." [18] (References omitted, emphasis added.)

For an excellent judicial statement regarding the broad extent of non-jury trial at common law, (including cases of assaults and batteries), see also *State v. Maier*, 13 N.J. 235, 99 A.2d 21 (1953), particularly at 25-29. At p. 29, Chief Justice Vanderbilt summarized the law of that era thus:

"In any event, there can be no doubt of the power of the justice of the peace at common law before

[18] Frankfurter and Corcoran, *op. cit. supra* note 11, at 927.

1776 to punish common or simple assaults and assaults and batteries summarily without presentment or indictment and without trial by jury." [19]

(2) *The American Colonial and Constitutional Experience.*

The American colonial experience of widespread non-jury trials was very similar to the English. In a careful examination of the law of seven of the American colonies, Frankfurter and Corcoran conclude that two points are clearly seen:

> "first, that all of the colonies whose records have been examined, acted on the conviction that the much cherished jury procedure was not imperative for small offenses; secondly, that the practice of summary procedure, pursued in varying measure by the different colonies, persisted unchallenged through the acrimonious controversy with the Crown over the denial of the jury in admiralty courts, through the framing of the jury clauses in state constitutions, and through the enactment of the jury clauses in the Federal Constitution." [20]

The authors cite in detail numerous different offenses and penalties, triable in these colonies by a court without a jury.[21]

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[19] See also IV Blackstone, *Commentaries*, *280 *et seq.* in which that author argues against but admits the broad coverage of summary trial. See also Kaye, *op. cit. supra.* note 16 at 247, in which that author, too, admits the broad scope of non-jury trials, including those for grievous offenses. "Prosecutions of serious derelictions were also authorized without jury intervention." (Reference omitted) Ibid.

[20] Frankfurter and Corcoran, *op. cit. supra* note 11, at 937.

[21] *Ibid.* at 938-65 and at 983-1019.

It is indeed true that the right to jury trial was a burning issue in the minds of the colonists in the pre-revolutionary days. Thus, in the Declaration and Resolves of The First Continental Congress, dated October 14, 1774, there appears this resolution:

> "Resolved, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law." [22]

What underlay this declaration was not the extension of summary jurisdiction over minor offenses, such as battery, for which non-jury trial had long been the previous mode of trial. Rather, this declaration was motivated by certain Parliamentary acts which permitted the colonist, charged with treason, to be tried in England by a jury of Englishmen, rather than of fellow Americans. Another act of Parliament, providing the death sentence for anyone destroying His Majesty's ships, authorized trial where the crime was committed or in England. A further Act authorized the sheriffs of Massachusetts, appointed by the Crown's Governor, to select and, thus, control a jury.[23] Clearly, the harsh measures enacted during the reign of King George III cannot be used as authority to conclude that history proves the right of trial by jury in every penal action.

Similarly, the draftsmen of the Declaration of In-

[22] As quoted in *Perry, op. cit. supra* note 13, at 288.
[23] Perry, *op. cit supra* note 13, at 281-82.

dependence, complained of the deprivation ". . . in many cases of the benefits of trial by jury." [24] However, it would be erroneous to conclude that this meant that they wanted trial by jury in every instance. They wanted the integrity of the judiciary and its independence of King George III reestablished; *viz.* "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." [25] Likewise, the same serious inroads upon traditional jury trial that prompted the above-mentioned Declaration and Resolves of the First Continental Congress were the motivating factors here. Thus, they complain further of King George III: "For transporting us beyond seas to be tried for pretended offenses;" [26] Preservation, not extension, of the traditional right to jury trial was their purpose; and, as has been seen, this traditional right recognized the broad scope of summary trials.

Appellant relies on the fact that eleven of the former colonies adopted constitutions providing trial by jury after the pattern of English law.[27] Properly understood, it is an accurate statement because the pattern of English law and of the early state law always recognized the propriety of broad summary jurisdiction in the cases of less serious offenses, while still recognizing the desirability of jury trial in most serious matters. There is little doubt that, even in

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[24] 1 Stat. 1, 2, July 4, 1776.

[25] Declaration of Independence, 1 Stat. 1, 2, July 4, 1776.

[26] *Ibid.*

[27] Appellant's brief, at 13.

those instances where early state constitutions enunciated the right to jury trial in very broad terms, the actual intent, understanding, and practice of those states upheld the legality and propriety of non-jury trial.[28]

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[28]The Virginia Constitution, whose Bill of Rights was the prototype of the Bill of Rights of the United States Constitution (Perry, *Sources of Our Liberties* (c.1959) at 309), provided at Section 8: "That in all capital or criminal prosecutions a man hath a right to . . . a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; . . . that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." (As quoted in Perry, *op. cit. supra*, at 312.) But the actual practice clarified this constitutional statement. "In this colony we again find voluminous evidence of the dispensation of the jury in trials for minor offenses. . . . At the time of the Revolution at least sixty-five offenses were thus entrusted to the summary power of magistrates without jury and without right of appeal. . . . The Revolution brought no change in this practice, despite the jury clause of the Virginia Bill of Rights." Frankfurter and Corcoran, *op. cit supra.* note 11, at 962-64. See also, 1 Craven, the Southern Colonies in the 17th Century (1949), pp. 168-169, 270-271, 287.

The provisions of certain other early state constitutions were similarly worded. See Constitution of Pennsylvania, August 17, 1776, at Sec. IX. Quoted in Perry, *op. cit supra*, at 330. For documentation that broad summary jurisdiction in Pennsylvania was authorized both before and after this constitution was enacted, see Frankfurter and Corcoran, *op. cit. supra.* note 11, at 954-957.

The jury trial provision of the Delaware Declaration of Rights of 1776 set out at Section 14, as quoted in Perry, *op. cit supra*, at 339, and was similar to the Virginia wording.

The jury trial provision of the Maryland Constitution of

This, then, is the background against which the drafters of the United States Constitution authored the jury provisions of the Federal document (Article III, Section 2 and Sixth Amendment). When the con-

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1776, was set out at Section XIX, as quoted in Perry, *op. cit. supra*, at 348, and was similar to the Virginia clause. However, note the wording of Section III, quoted at p. 346: "That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, *according to the course of that law. . . .*" (Emphasis added.) Again note that widespread summary jurisdiction was broadly exercised and considered in perfect harmony with the constitutional right to jury trial. Frankfurter and Corcoran, *op. cit. supra* note 11, at 957-962, particularly at 960.

The Constitution of North Carolina of 1776 made explicit reference to the customary prior usage and understanding of the right to jury trial; Section IX states: "That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, *as heretofore used.*" (Emphasis added.) As quoted in V Thorpe, *The Federal and State Constitutions, Colonial Charters and other Organic Laws, (1909) at 2787.* See also, Craven, The Southern Colonies in the 17th Century, (1949) pp. 354-355.

Vermont was not one of the thirteen original states. However, the Constitution of Vermont of 1777 had its jury right clause set out at Ch. 1, Sec. X, as quoted in VI Thorpe, *op. cit supra*, at 3741. It was similar to the provision of the Virginia Constitution.

The Constitution of Massachusetts of 1780, Part I, Sec. 12, provided for jury trial only in limited instances. It stated in pertinent part:

> And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, *but by the judgment of his peers, or the law of the land.*
>
> And the legislature shall not make any law that shall

stitutional authors stated that there shall be a trial by jury for all *crimes* and in all *criminal prosecutions*, did they call for universal application of trial by jury in all penal actions against an individual?

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subject any person to a *capital* or *infamous* punishment, excepting for the government of the army and navy, without trial by jury." (Emphasis added.)

Quoted in III Thorpe, *op. cit. supra*, at 1891. Note, too, the constitutional authority of the justice of the peace at Part II, Chapter III, Sec. III, quoted, *ibid*, at 1906. For the actual practice in Massachusetts at that time and proof of wide spread summary jurisdiction, see Frankfurter and Corcoran, *op. cit. supra* note 11, at 938-942.

The provisions of the Constitution of New Hampshire of 1784 regarding jury trial (Article I, Sections XV and XVI) were also very limited and were substantially similar to the Massachusetts provisions. See, IV Thorpe, *op. cit. supra*, at 2455.

Article XXII of the New Jersey Constitution of 1776 provided:

> "That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force, until they shall be altered by a future law of the legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever."

As quoted in V Thorpe, *op. cit. supra*, at 2598. It should be noted that this was probably an even stronger statement of the right to jury trial than that in the United States Constitution. Nevertheless, it is undisputed that the intent and application of this right were in perfect harmony with widespread summary jurisdiction in New Jersey, including cases of battery tried by judge without jury. See, Frankfurter and Corcoran, *op. cit. supra*, note 11, at 949-954. See, also *State*

This Honorable Court has answered that question in the negative as recently as in 1966. In *Cheff v. Maier*, 13 N.J. 235, 99 A.2d 21 (1953). Once again it is made clear that these early states' concern was to preserve, not extend, the right to jury trial, as it had been previously exercised.

Section XIII of the New York Constitution of 1777 provided that no citizen may suffer any deprivation ". . . unless by the law of the land, or the judgment of his peers." As quoted in V Thorpe, *op. cit. supra*, at 2632. Section XLI provided that: ". . . trial by jury, in all cases, in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever." *Ibid*, at 2637. It is well documented that New York recognized wide summary jurisdiction in harmony with these constitutional guarantees, both before and after the enactment of this constitution. Frankfurter and Corcoran, *op. cit. supra* note 11, at 944-949, particularly at 946-7.

Article XLI of the Constitution of North Carolina of 1778 guaranteed the individual only no deprivation of liberty ". . . but by the judgment of his peers or by the law of the land." VI Thorpe, *op. cit supra*, at 3257. This was only the Magna Carta type provision; and, presumably, extensive summary jurisdiction grew up under it just as it did under Magna Carta, and the other states.

The Georgia Constitution of 1777 did not mention in what, if any, instances a jury trial was guaranteed. See Articles XL-XLIII, II Thorpe, *op. cit. supra*, at 783.

Connecticut drafted no constitution at or about the time of the Revolution. However, it is well documented that Connecticut had extensive non-jury trial jurisdiction both long before and long after 1776. See Frankfurter and Corcoran, *op. cit. supra*, note 11, at 942-4.

Likewise, Rhode Island drafted no constitution during that period. However, Kaye states of its trial and summary practice: "Like Connecticut, it governed itself under the English law incorporated by its colonial charter as amended from time to time." Kaye, *op. cit. supra* n. 16, at 249.

v. Schnackenberg, 384 U.S. 373, 379 (1966), the Court quoted with approval its holding in *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937):

> "It is settled by the decisions of this Court . . . that the right of trial by jury . . . does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury. . . ."

The Court, in explicitly holding that the prosecution of a petty offense requires no jury trial, also quoted with approval at 384 U.S. 379 the following statement from *Callan v. Wilson*, 127 U.S. 540, 557 (1888):

> ". . . in that class or grade of offences called 'petty offences,' which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, a jury trial is not required."

See also, *Natal v. State of Louisiana*, 139 U.S. 621 (1891); *Lawton v. Steele*, 152 U.S. 133, at 141-142 (1894); *Schick v. United States*, 195 U.S. 65, at 68-72 (1904) and *District of Columbia v. Colts*, 282 U.S. 63, 72-73 (1930). Each of the foregoing cases recognizes the validity of summary criminal jurisdiction under the United States Constitution. Each of these cases was cited with approval by this Honorable Court in *Cheff, supra*. Consider, also, 18 U.S. 1(3) and Federal Rule of Criminal Procedure 23(a).

Thus, history and the decisions of this Court concur in their findings that the right to jury trial does not extend to every prosecution in the name of the

government against an individual. It should be noted, however, that this well recognized exception to jury trial does not entail an exception to the due process requirements of the Fifth or Fourteenth Amendments to the United States Constitution. Indeed, it is elementary that the due process requirements of those amendments apply to every abridgment of one's liberty or taking of one's property by a government, Federal or State. Thus, the *Natal* case,[29] discussed above, which was decided expressly on the issue of due process vel non, upheld trial without a jury. Similarly, in *Tumey v. Ohio*, 273 U.S. 510 (1927) this Court again applied the precepts of due process to a petty offense case.

In *Gaskill v. Commonwealth*, 144 S.E. 2d 293 (1965) the Supreme Court of Appeals of Virginia said:

> "It is undeniably true that certain rights secured under the first eight amendments to the Federal constitution have been held to be implicit in the concept of ordered liberty and hence binding on the states through the due process clause of the Fourteenth Amendment. *But certainly the right of a trial by jury has never been deemed a sine qua non to the rendition of justice in all criminal cases—if so, not even the most petty offenses would be triable without a jury.*" (Emphasis Supplied.)

It is obvious that due process does not require a trial by jury; for, otherwise, there could never be a

[29] 139 U.S. 621 (1891).

trial without a jury, either Federal or State. As shown by *Natal* and *Tumey*, due process obtains in the smallest of penal actions. Trial by jury does not. Jury trial obtains in Federal prosecutions in all non-petty cases by reason of Article III, Section 2 and the Sixth Amendment, United States Constitution. Jury trial obtains in State prosecutions only by reason of State law; for the only vehicle for applying the Federal jury trial clauses to the States, the due process clause of the Fourteenth Amendment to the United States Constitution, does not include the right to jury trial.

Mr. Justice Cardozo, speaking for this Honorable Court, stated it this way:

> "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so noted in the traditions and conscience of our people as to be ranked as fundamental'. . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." [30]

It is submitted that this Honorable Court made the proper distinction in *Irvin v. Dowd*,[31] when it insisted upon the integrity of the jury in that instance since the applicable state law called for a jury trial.

As this Court pointed out in its recent review of a

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[30] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). See also, *Fay v. New York*, 332 U.S. 261, at 288, 294-5 (1947).

[31] 366 U.S. 717, 721-2 (1961).

murder trial, in *Turner v. Louisiana*, 379 U.S. 466, at 471 (1965):

> "This case does not involve the question whether the Fourteenth Amendment requires a State to accord a jury trial to a defendant charged with murder. The question, rather, goes to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord. We had occasion to consider this basic question less than four years ago in *Irvin v. Dowd*, 366 U.S. 717."

Thus, no State may require a jury trial under the guise of protecting the defendant's rights and at the same time so tamper with that jury as to produce an unfair hearing. And, as appellant has pointed out,[32] this Court has protected the integrity of the jury wherever the trial by such has been required. It would be patently erroneous, however, to conclude that the Court's action means, or in any way implies, that a State must have a jury trial in every prosecution.[33]

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[32]The cases cited by appellant in the text of his brief at pp. 17-18, regarding this Court's concern for the integrity of trial by jury, all proceed on the premise that a jury trial, where the defendant is tried by jury, must be fair, must be in accord with due process. None of those cases pertain to the issue at hand; i. e., the scope of the right to jury trial. The only relevant issue to which those cases pertain is their showing that due process obtains in every trial, a conclusion with which appellee in no way disagrees. When cited as authority for concluding to the universal application of jury trial, their use is seriously contested by appellee.

[33]Appellant's brief at pages 15-16 cites and quotes numerous opinions of this Court, in which the issue before the Court was the right of a civilian, charged with a grave felony, to be tried by a civilian court rather than by a court-martial

Key concepts of due process prevail at every level. They apply to every prosecution, whether by States or by the Federal Government. They apply to trials of petty offenses by the Federal Government. The Fifth Amendment to the United States Constitution affords Federal petty offenders due process; it does not afford them a jury trial. Similarly, the Fourteenth Amendment affords State offenders due process; it does not afford them a jury trial.

(3) *Louisiana History of Jury Trial*

Appellee does not rest its case solely on the peculiarities of Louisiana history. However, it does feel that the history of Louisiana law clearly reflects the great trust that Louisiana has placed in its judiciary and the great emphasis it has placed on trial by judge without jury, both in criminal and civil matters. Regarding civil matters, the attention of the Court is respectfully invited to Louisiana Code of Civil Procedure, Article 1733, rendering civil jury trials unavailable in certain broad instances, and to Article 7, Sections 10 and 29, Louisiana Constitution, in which the State Supreme Court and Courts of Appeal are given appellate jurisdiction over both law and facts in

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or military tribunal. Obviously, the statements of the Court in the context of that issue in no way reflect light upon the issue of the scope of jury trial within the civilian legal system. To hold that it is beyond the authority of the Federal Government to try by court-martial, citizens charged with capital offenses against military personnel or with homicides of military personnel, in no way is a holding that every citizen, chargeable with a lesser offense, is entitled to a civilian jury trial.

civil cases. For a brief review of Louisiana's history of right to jury trial in criminal cases, see Appendix C.

As may be seen from that history, there was no jury trial under either the French or the Spanish administration. Upon Louisiana's becoming a possession of the United States, there was broad authorization for non-jury trial, and a jury trial was granted in a case of simple battery, only if demanded.

The case of *Natal v. State of Louisiana*, 139 U.S. 621 (1891), establishes that at least since 1852, non-jury trials for violations of municipal ordinances were constitutionally authorized in Louisiana. At 139 U.S. 624, this Court stated:

> "The ordinance of the City of New Orleans, prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars, and of imprisonment for not more than thirty days if the fine is not paid, was within the authority constitutionally conferred upon the city council by the Legislature of the State. A breach of such an ordinance is one of those petty offenses against municipal regulations of police, which in Louisiana, or elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury. Louisiana Constitution of 1852, Arts. 103, 124; Constitution of 1868, Arts. 6, 94; *State v. Gutierrez*, 15 La. Ann. 190; *Monroe v. Meuer*, 35 La. Ann. 1192; *Callan v. Wilson*, 127 U.S. 540, 553, 555."

It is noted that the same or similar authorization for municipal offenses to be tried without a jury, that

were cited in *Natal*, were also found in the Constitution of 1845, at Title VI, Article 128 and at Title IV, Article 81. See Appendix C. Such authorization may have been contained even in the Constitution of 1812 at Section 23. See Appendix C. From this earliest period to date, such non-jury trials have consistently been authorized in Louisiana.

Regarding State prosecutions for misdemeanors, since 1898 to date, almost seventy years, both the State's constitutions and legislative laws have precluded trial by jury. See Appendix C.

For the most recent pronouncement of the Louisiana State Supreme Court upholding the constitutionality of non-jury trials of misdemeanors, see *State of Louisiana v. Reuben L. Jones*, No. 48,610, decided December 11, 1967. Therein at p. 5, the Court stated:

> "It seems to be well established by the decisions of the United States Supreme Court that the constitutional right of trial by jury does not extend to every criminal proceeding, and that a jury is not demandable in trials for petty offenses. *Callan v. Wilson*, 127 U.S. 540, 32 L.ed 223, 8 S.Ct. 1301; *District of Columbia v. Clawans*, supra; *Cheff v. Schnackenberg*, 384 U.S. 373, 16 L.ed2d 629, 86 S.Ct. 1523, and the many authorities there cited. . . ."

At pp. 6-7, the Court stated:

> ". . . we are unable to perceive that an accused in a misdemeanor case is necessarily denied due process or a fair trial when he is tried by a judge instead of a jury. A fair trial, as we

> understand the expression, means simply a trial that is just; a trial in which the accused is given the benefit of all the safeguards provided by the Constitution and laws and one in which even-handed justice is dispensed. We cannot conceive, in the absence of proof to the contrary, that there is any rational basis for declaring that an unbiased judge cannot dispense justice in a misdemeanor case with the same quality of fairness and impartiality which could be expected of a jury which acts under the instructions of the judge. . . ."

In summary, Louisiana has long entrusted its judiciary with broad powers in the adjudication of personal and property rights. This Court paid due deference to the propriety of maintaining such local legal institutions.

> "But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court always has been careful not so to interpret this Amendment (Fourteenth Amendment to U.S. Constitution) as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences." (Parenthetical matter added; reference omitted) *Fay v. New York*, 332 U.S. 261, 294 (1947).

See also. *Spencer v. Texas*, 385 U.S. 554, 564 (1967).

E. A SUBSTANTIAL NUMBER OF STATES DO NOT TREAT JURY TRIALS AS A BASIC RIGHT.

Appellant's claim that in 38 states, a criminal defendant subject to a maximum term of imprisonment

in excess of six months cannot be convicted without the unanimous verdict of a twelve man jury, is inaccurate and misleading.[34] Appellant's "Appendix B" does not support his generalities which sweep too broadly as demonstrated below:

1. *Alabama*—Constitution, Article 1, Sec. 6 requires a jury only in prosecutions by indictment as follows: "that in all criminal prosecutions the accused has a right to be heard . . . *and in all prosecutions by indictment* a speedy public trial by an impartial jury . . ." By statute, Alabama has provided that any misdemeanor may be instituted by information and tried in a court of inferior jurisdiction without a jury. A person convicted in a court of inferior jurisdiction may appeal to the circuit court and ask for a jury, but he is required to stand trial first in a court of inferior jurisdiction without a jury. Alabama Code, Title 15, Section 321. Alabama's definition of misdemeanor is the same as that of Louisiana. Title 1, Sec. 7, Code of Alabama of 1940.

2. *Arkansas*—Police Courts which have concurrent jurisdiction with Justice of the Peace Courts over all misdemeanors committed in violation of state law within city limits and Mayor's Courts, try misdemeanors without juries. Arkansas Statutes Ann., Sections 22-738; Sections 44-114, 44-115, 44-116.

3. *Delaware*—Jury trial is not required in any

[34]Reminiscent of the well known propaganda device called "card-stacking", selecting only that part which supports one's view and leaving out the rest. See Starratt Lewenstein, Our American Government Today, (2d ed. 1966) pp. 123-124.

misdemeanor cases. Imprisonment of more than six months may be imposed by Justice of the Peace Courts and by the Municipal Courts of Wilmington, which conducts trials of misdemeanors without a jury. In two counties of Delaware a defendant may elect to go into the Court of Common Pleas and be tried by a jury, but in New Castle County there is no opportunity for a jury trial as the Court of Common Pleas does not have a jury. A defendant tried in the Court of primary jurisdiction without a jury has a right to appeal to the Superior Court for a trial de novo with a jury. Thus in New Castle County in Delaware all misdemeanors must be tried in the Court of primary jurisdiction, without a jury. See letter from the Attorney General of the State of Delaware, dated November 20, 1967, which letter is contained in Appendix "B" of this brief.

4. *Maine*—Justices of the Peace, trial justices, municipal courts and district courts try all misdemeanors without juries. However, a defendant may appeal a conviction and be tried de novo with a jury. *Sprague v. Andro Scoggin* 71 Atlantic 1090, 1091 (1908); page 172 Main Rules of Criminal Procedure. Although Maine rejects the petty offense concept, it requires a defendant to be tried in the first instance by a judge acting without a jury. *Johnson's Case*, 1 Me. 230 (1821).

5. *Maryland*—Motor Vehicle cases which carry penalties of more than six months' imprisonment are tried without juries. Local courts try misdemeanors

other than traffic offenses, without a jury, but the accused may elect to be tried by a different court with a jury. See letter of the Attorney General of Maryland, dated November 17, 1967 which is included in Appendix "B" attached hereto.

6. *Massachusetts*—District Courts and the Municipal Court of Boston try, without a jury, all misdemeanors and all felonies punishable in the penitentiary for five years or less. The sentences imposed by these courts may not exceed two and one half years and may not be in the penitentiary. Massachusetts General Laws, Chapter 218, Sections 26-27. However, if a defendant wants to take a chance of getting a stiffer sentence, and going to the penitentiary, he may appeal and get a trial de novo before a jury in Superior Court. Massachusetts General Laws, Chapter 212, Sec. 6 and Chapter 263, Sec. 6. Thus, Massachusetts gives a bonus to a defendant who is tried without a jury and places one who elects to be tried de novo in Superior Court in a position in which he takes a chance on a stiffer penalty.

7. *Minnesota*—In local courts for a violation of a municipal ordinances there is no right to a jury trial. *State v. Ketterer*, 248 Minnesota 173, 79 N.W. 2d. 136 (1956).

8. *Nebraska*—Violations of municipal ordinances are tried by Police Magistrate without a jury, whether or not the same conduct constitutes a state offense, which is triable by a jury in state court. *State v. Lookabill*, 176 Nebraska 125 N.W. 2d 695. As stated by the Attorney General of Nebraska in his letter of

November 12, 1967, contained in Appendix "B"—"as a matter of actual practice, a jury is rarely demanded. In my seven years in the private practice in a small community, I only recall a jury having been demanded on one occasion. Also, I just talked with the judge of one of our busier inferior courts here in Lincoln, and it has been more than five years since a jury was demanded in his court".

9. *New Hampshire*—All misdemeanors punishable by fine not exceeding $1,000.00 and imprisonment not exceeding one year, or both, are tried in District Court without a jury. New Hampshire Revised Statutes, Ann. 502:18. If punishable by a maximum $500.00 fine and imprisonment not exceeding one year, a misdemeanor is tried by Municipal Court without a jury. Art. 77 of the State Constitution allows the legislature to give inferior courts power to try, subject to appeal and trial by jury, all criminal causes wherein punishment is less than imprisonment in the penitentiary. Under the statutory scheme a defendant must first submit to the trial of a misdemeanor in a district or municipal court and then appeal to superior court before he can have a jury trial. Statistics compiled by the State of New Hampshire Judicial Counsel show that for the year ending 1966, out of 51,197 criminal cases tried without a jury, only 562 appealed to Superior Court where a jury trial might be had. See letter of Attorney General of New Hampshire, dated November 15, 1967 and memorandum of State of New Hampshire Judicial Council dated July 21, 1967, included in Appendix "B".

10. *New Jersey*—All disorderly person offenses, carrying a maximum penalty of one year in jail or $1,000.00 fine, or both, are tried without a jury. N.J.S. 2A:169-4. Such offenses are considered minor and are tried summarily without indictment or trial by jury. The minor nature of the offenses, rather than the penalty determines whether trial by jury will accrue. *State v. Maier*, 99 A 2d 13, 21 N.J. 235 (1953); *Latimer v. Wilson*, 103 N.J. L. 159 (1926). The Magistrate's Court may also summarily proceed with many assorted offenses, including motor vehicle violations and other offenses which are specified in the letter of the Attorney General of the State of New Jersey, dated November 17, 1967 which is included in Appendix "B" hereof.

11. *New York*—As conceeded in Appellant's brief, offenses carrying one year imprisonment may be tried in the Courts of New York City without a jury.

12. *New Mexico*—Art II Sec. 12 of the state constitution provides that the right to trial as it heretofore existed shall remain "inviolate". The law applicable at the adoption of the state constitution, Sec. 1047, 1897 Compiled Laws of New Mexico, limited trial by jury to prosecutions instituted by indictment or information. Therefore, jury trial in New Mexico does not extend to any crime which did not exist under territorial law immediately prior to the adoption of its constitution and the prosecution of which was not instituted by indictment or information.

13. *North Carolina*—Article 1, Sec. 13 of the State Constitution provides for jury trials but allows

the State Legislature to provide other means of trial for misdemeanors. By statute, all misdemeanors are tried in District Court without a jury. North Carolina General Statutes, 7A-272 and 7A-196E. The defendant has a right to appeal to the Superior Court where he is given a trial de novo with a jury.

14. *Oregon*—There is no right to jury trial in habitual criminal proceedings, Oregon Revised Statutes 168.015 and 168.090; *State v. Hoffman*, 236 Oregon 98, 385 P. 2d 741 (1963). There is no right to jury trial in cases of indeterminate life sentences, upon conviction of certain sexual offenses. Oregon Revised Statute 137, 111; *State v. Dixon*, 238 Oregon 121, 393 P.2d 204 (1964).

15. *Puerto Rico*—The Constitution requires trial by jury only for felonies. All misdemeanors are tried without a jury. See *Fournier v. Gonzales*, 269 Federal 2d 26 (1st Circuit 1959), a murder prosecution, wherein it was held that the Fourteenth Amendment of the Federal Constitution does not require trial by jury in Puerto Rico. The letter of the Attorney General of the Commonwealth of Puerto Rico, dated November 15, 1967, citing numerous authorities, is included in Appendix "B" in support of the above statements.

16. *Rhode Island*—Although the State Constitution, Art. 1, Sec. 10 requires trial by jury in all criminal prosecutions, initial jurisdiction over all misdemeanors (offenses punishable by a fine not exceeding $500.00 and/or one year's imprisonment) is conferred on District Courts or Municipal Courts where

defendants are tried by a judge without a jury. See 12-3-1 General Laws of Rhode Island. There is a right to appeal de novo to Superior Court with a trial by jury. Secs. 12-22-1 and 12-22-9, General Laws of Rhode Island.

17. *Virginia*—The State Constitution, Sec. 8 authorizes the Legislature to provide for the trial of offenses which are not felonious by a Justice of the Peace or another inferior tribunal without a jury, with the right to appeal and trial de novo before a jury, which appeal must be taken within ten days of conviction. Virginia Code Ann. Sec. 16.1-132. The maximum penalty for misdemeanors is $500.00 and/or confinement in jail for twelve months. In addition, "petty offenses" which were triable without a jury at the time of the adoption of the Virginia Constitution in 1776 are not triable by a jury because they are not considered either crimes or misdemeanors in Virginia. *Ragsdale v. Dannville*, 82 S.E. 77 (1914).

18. *Virgin Islands*—By Act of Congress, July 22, 1954, Chapter 558, 68 Stat. 497, misdemeanors which are tried in *District Courts* are triable before a jury where the penalty exceeds six months. But misdemeanors which are tried in *Municipal Court*, established by the Legislature of the Virgin Islands, are tried without a jury and the penalty can exceed six months. See page 2 of letter of Attorney General of the Virgin Islands, dated November 20, 1967, which letter is included in Appendix "B" hereto.

From the above survey it is clear from the treatment accorded jury trials in the states enumerated

above that even where it is provided it is not considered a basic right. Thus, in Alabama, Delaware, Maine, New Hampshire, North Carolina, Rhode Island and Virginia, defendants must first submit to a trial before a judge without a jury before they can appeal and receive a jury trial. The denial of the right to trial by jury in the courts of primary jurisdiction, requiring the defendants to undergo the expense and time loss inherent in an appeal in order to secure a jury trial, limiting defendants to a short period within which to do so, and providing that their right is waived unless exercised within the rigid rules prescribed, make it clear that those states which provide such a system do not consider jury trial as fundamental or necessary to a fair trail. The discrepancy between the number of trials held without a jury in New Hampshire (51,197) and the number of cases appealed for a trial de novo before a jury (562) shows that there are many defendants who are unable or unwilling to assume the risk and burden concomitant to an appeal. Only an unfettered right to a jury trial would meet due process requirements if jury trial was essential to a fair trial. Those states requiring trial without a jury in inferior courts of primary jurisdiction necessarily believe that such a trial is a fair one, otherwise such trials would be void and empty proceedings.

In Maryland, New Jersey, New York, Oregon, Puerto Rico and the Virgin Islands we have seen from the above survey that misdemeanors carrying more than six months penalty are tried without juries and

in Massachusetts we have seen that Defendants electing to be tried with a jury are subjected to a chance of receiving heavier sentences. Such treatment by the states is contrary to any attitude that jury trial is necessary for a fair trial.

With reference to the modification by the various states of the common law twelve man jury, in addition to those pointed out by Appellant, the following states have rejected the idea of the jury required by the Sixth Amendment:

Arizona—Const. Art. 2, § 23—Provision may be made by law for a jury of a number less than 12 in courts not of record.

Arkansas—Jury of 6 in justice of the peace courts which try misdemeanors. Ark. Stat. Ann. Sec. 26-608 (Repl. 1962)

Colorado—Art. II, Sec. 23 of state constitution provides that in criminal cases in courts not of record, a jury may consist of less than 12 persons. Rule 123(b) of the Colorado rules of Criminal Procedure provides for a jury of 3 in the trial of any misdemeanor. A defendant may ask for a jury of 12, but must advance one day's juror fee for each juror over 3, which fee is taxed as costs. See 78-7-4 Colo. Rev. Stats. 1963.

Connecticut—Conn. Gen. Stat. Ann. § 54-82—Accused may choose to be tried by court instead of jury or in non-capital cases, he shall be tried by a jury of 6 unless he asks for jury of 12.

Delaware—Del. Super. Ct. (Crim) Rule 23b—

Jury is to be composed of 12, yet before verdict parties may stipulate it will be composed of less than 12.

Georgia—The State Const., Art. 6, Sec. 16, par. 1, allows the legislature to prescribe a jury of not less than five for all trials except in Superior Court. The legislature has provided juries of less than 12 for special county criminal courts which try all misdemeanors in the county. See *McIntyre v. State*, 11 S.E.2d 6 (1940); *Welborne v. Donaldson*, 41 S.E. 999 (1902).

Illinois—Const. Art. 2, § 5—Trial may be by consent of parties with less than 12 jurors. *Rehm v. Halverson*, 64 N.E. 388 (1902); *Polvich v. Glodich*, 142 N.E. 466 (1924) or may be waived, *People v. Hepkins*, 194 N.E. 2d 213 (1964).

Kansas—Kan. Gen. Stat. Ann. 60-248 (referred to in 62-1412) says parties may stipulate number of jurors or number required to render verdict.

Maryland—Md. Rules P. 743—Jury shall consist of 12 but before verdict parties may stipulate that it shall consist of less than 12.

Michigan—Const. Art. 1, § 20—Jury may be less than 12 in courts not of record.

Mississippi—Miss. Code Ann. § 1836 provides for a jury of less than 12 in justice of the peace courts.

Missouri—Art. 1, Sec. 22 provides that in non-record courts there may be less than 12 and that a ⅔ majority rules.

Montana—Art. III, sec. 23 provides for a jury of less than 12 when not a felony and provides for a 6 man jury in justice of the peace court.

Nebraska—Art. I, sec. 11—May have less than 12 for misdemeanors. Neb. Rev. Stat. §18-205 says no more than 6 for misdemeanors in police courts.

Nevada—Nev. Rev. Stat. §186.010 et seq., in justice courts, the jury may be from 3-12.

New Mexico—N.M. Stat. Ann. §36-12-3 in justice of the peace courts 6 man jury.

North Carolina—Art. IV, sec. 27 defendant in Justice of peace courts may demand jury of six. N.C. Gen. Stat. §7-204 provides for six man jury in recorder's court (an inferior court).

North Dakota—Art. I, sec. 7 provides for less than 12 in non-record courts.

Ohio—Ohio Rev. Code Ann. §2938.06 allows the accused to stipulate for less than 12 in a magistrate's court.

Oregon—10 out of 12 jurors may return a verdict in any crime other than murder in circuit court. It all courts other than circuit courts, juries are composed of less than 12 members. *State v. Osbourne*, 153 Oregon 484, 57 P.2d 1083 (1936).

Puerto Rico—Nine out of twelve are required to convict.

Texas—A jury of 6 for misdemeanors tried in county court. Art. 33.01 Texas Code of Criminal Procedure; a jury of 12, 9 of whom may

render a verdict for misdemeanors tried in District Court, Art. 37.02, Texas Code of Criminal Procedure.

South Dakota—Art. VI, sec. 6 says legislature may provide for a jury less than 12 in courts not of record.

Tennessee—Tenn. Code Ann. §40-2504 provides for a six man jury for a misdemeanor which does not involve imprisonment.

Vermont—Vt. Stat. Ann. Tit. 12, §1505 provides for less than 12 (but not less than 6) on agreement of the parties.

Virginia—Jury of five for misdemeanors. (Va. Code Anno. Sec. 19.1-20.6.)

Washington—Wash. Rev. Code Ann. §2.36.050 provides for a six man jury in Justice of Peace court. §35.20.090 makes reference to 6 man jury for municipal courts.

Wisconsin—Wis. Stat. Ann. §270.15 (not cited by petitioner) provides for less than 12 on agreement. Wis. Stat. Ann. §957.01 allows parties to stipulate for less than lw. Wis. Stat. Ann. §302.09 may agree to a 6 man jury or less in Justice of Peace court.

Wyoming—Wyo. Stat. Ann. §7-427 allows a 6 man jury to be agreed to in lesser courts.

APPARENTLY SUPERFLUOUS PROVISIONS CITED BY PETITIONER

Delaware—Del. Code Ann. Tit. 11, §2701 (Supp. 1966)—States only jurisdiction of Court of Common Pleas for Kent County to hear misdemeanors, with exceptions.

Illinois—Ill. Ann. Stat. ch. 78, §20—states only procedure for drawing jurors by lot; ch. 78, §23 states only provisions of jury impaneling act.

Indiana—Ind. Ann. Stat. §9-1811 (1956) states only that jury verdict will be in open court and right of defendant to poll jury.

Kansas—Kan. Gen. Stat. Ann. 62-1501—states only manner of rendering verdict by jury.

Michigan—Mich. Stat. Ann. §28.1191 (1954)—Applies only to justice of peace; jurisdiction; effect of imposition of excessive penalty; imposition of certain fines.

Mississippi—Miss. Code Ann. §1202 (1957)—inapplicable as it deals only with appeals, no reference to the jury system.

Missouri—Mo. Rev. Stat. 546.390 refers to validity of verdicts, not applicable to question.

Nebraska—Here it is apparent that the appellant cited the wrong statutes and constitutional articles. Art. III, sec. 11 has no reference to problem. Art. III, sec. 6 has no reference to problem. Statute 29-2022 not applicable, deals with sequestration of jury. Art. I, sec. 6 and Art. I, sec. 11 do deal with the problem and provide for right to jury trial except in petty offenses.

Nevada—Nev. Rev. Stat. §175.480 refers only to polling the jury.

Ohio—Ohio Rev. Code Ann. §2945.77 is not applicable, refers to polling the jury.

South Dakota—S.D. Code §34.3673—not applicable, refers to the polling of the jury.

It should be clear from the above charts that the criminal administration of many states other than Louisiana would be affected by the decision if the Sixth Amendment jury trial right applies directly to the states. It should also be clear that Louisiana, far from being eccentric in the treatment which it accords to jury trials, is in accord with a substantial number of her sister states.

The fact that the right of trial by jury has been construed in the light of the common law as it existed when the state and federal constitutions were adopted so as to limit it to that class of cases which at common law, or at the time of the adoption of the respective constitutions, were triable by jury, shows that trial by jury is not fundamental. Thus in *Pearson v. Wimbish*, 124 Georgia 701 52 S. E. 751 (1906) it was observed that the phrase "the right of trial by jury shall remain inviolate" found in many state constitutions, means that the right of trial by jury, as it existed in the colonies before the Revolution, should be preserved, but was not to be enlarged; nor was it to be extended to instances where summary trial without a jury was authorized and practiced.

In *Premier Cereal and Beverage Co. v. Pennsylvania Alcohol Permit Board*, 292 Pa. 127, 140 Atl. 858 (1928) the court held that the state constitutional guarantee of trial by jury did not prevent the legislature from providing other tribunals for the trial of offenses created subsequently to the adoption of the Constitution. To the same effect, *Inwood v. State*, 42

Ohio State 186 (1884) and *Tims v. State*, 26 Alabama 165 (1855).

A right which is fundamental is not subject to limitation. It would apply to crimes created after the adoption of the Constitutions as well as those in existence prior thereto, and petty offenses would not be excepted.

If a jury is essential to a fair trial, it can make no difference whether the defendant's trial is for a petty offense or a serious crime, or for a crime created prior to a certain date or after that date.

In *Harvey v. Mississippi*, 340 F.2d 263 (5th C.C. A. 1965), the court, discussing the constitutional right of counsel under the Fourteenth Amendment stated that "the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."

In *Application of Gault*, 87, S.Ct. 1428 (1967), concerning the right of a juvenile to procedural due process under the Fourteenth Amendment, the Court held that procedural due process under the Fourteenth Amendment was the right of juveniles as well as adults. "Under our Constitution, the condition of being a boy does not justify a kangaroo court." 87 S.Ct. at 1444. It is noteworthy that this Court held that the procedural due process to which a juvenile was entitled included notice, counsel, confrontation, privilege against self-incrimination and right of cross-examination, *but it did not mention jury trial* as a funda-

mental right, citing *Kent v. United States*, 393 U.S. 541. See 87 S.Ct. at 1436.

Therefore, the petty offense exception recognized by the federal courts and the numerous exeeptions to jury trial recognized in all states show the non-fundamental nature of jury trial and prove that a jury is not an essential of a fair trial.

F. THAT JURY TRIAL HAS MERIT DOES NOT MEAN THAT IT IS INDISPENSABLE TO A FAIR TRIAL

Writing about juries in his work *The Hunting of the Snark*, 42 (1923), Lewis Carroll quipped:

> "The Jury had each formed a different view
> (Long before the indictment was read),
> And they all spoke at once, so that none of them knew
> One word that the others had said."

Lewis Carroll, like many other critics of the jury, obviously did not consider them "sacred cows."

Louisiana, however, does not deny the merits of a trial by jury.

Nevertheless, that trial by jury is meritorious does not mean that it is essential to the fairness of the fact-finding process, or that it is the only fair means of determining facts in a trial.

Alexander Hamilton in Federalist No. 83, pointed out the difference between those who believed in the utility of the jury (the moderates) and those who believed that a jury was absolutely essential (the

extremists). Hamilton's position was that a jury was of great value, but he refused to state that it was essential in a representative republic merely because it was considered of such merit as a defense against the oppressions of an hereditary monarch in England. Speaking of jury trials in *Federalist No. 83*, Hamilton states:

> "*. . . they will remain terminable as heretofore by the State courts only, and in the manner which the State constitutions and laws prescribe* . . . For my part I acknowledge myself to be convinced that even in this State it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these States as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature . . ."

"It certainly sounds not a little harsh and extraordinary to affirm that there is no security for liberty in a Constitution which expressly establishes the trial by jury in criminal cases, because it does not do it in civil also; while it is a notorious fact that Connecticut, which has been

always regarded as the most popular State in the Union, can boast of no constitutional provision for either."

Louisiana also recognizes the value of the right to trial by jury in that she requires it for felonies and capital crimes.

But like the federal courts with their "petty offense" exceptions, and like other states which have carved out many exceptions to the jury trial, Louisiana recognizes that a fair trial may be had without a jury and that the scope of the jury trial right may be limited and liberty still preserved.

Every one of Appellant's arguments (Appellant's brief pp. 21-32) relates to the value, rather than the necessity of a jury. Every one of Appellant's arguments is applicable to the petty offenses which federal courts try without juries. If it is impossible to have a fair trial without a jury of an offense carrying more than a six months' penalty according to Appellant's arguments Appellant's brief pp. 21-32), then it is also impossible to have a fair trial of an offense punishable by less than six months.

Appellant's attempt to connect his arrest with "opposition by parish officials to court-ordered desegregation" (Appellant's brief p. 22) is totally unsupported by the record in this case. His insinuation that the "personal and political leanings of the trial judge" (Appellant's brief p. 23) might have been antagonistic to him is also unsupported by even the minutest shred of evidence.

Had there been any substance to appellant's insinuation that a fair trial was impossible because of the judge's bias, his remedy was to ask for a change of venue under Articles 611 - 614, 623 of the Louisiana Code of Criminal Procedure or to ask the judge to recuse himself as provided in Article 671 (1) of the Louisiana Code of Criminal Procedure.

Instead, appellant made no claim that the judge was biased and produced no evidence to that effect; but he now attacks the judge's impartiality in his brief before this Court, on mere speculation. Surely, the principles of a fair trial should also apply to the state's case. Here appellant is seeking to attack the trial judge's impartiality on the basis of conjecture without allowing the state the benefit of confrontation or cross-examination of any witnesses that appellant might produce.

The value of trial by jury has been debated for many years, and there are many arguments on both sides.

Trial by jury was criticized by Gunnar Myrdal in his work *An American Dilemma* as follows:

> "The jury for the most part, is more guilty of obvious partiality than the judge and the public prosecutor". Myrdal, *An American Dilemma*, p. 552.

Complaints are frequently made as to the efficiency of the jury system as a fact-finding body. See McCarter, *The Jury System: A Twentieth Century View*, 4 Kan. L. Rev. 425 (1926); Sebille, *Trial*

by Jury, An Ineffective Survival, 10 American Bar Journal 53, (1924); Howard, *Trial by Jury*, 17 Century 683; Green, *Why Trial by Jury*, 15 American Mercury 316; J. C. McWhorter, *Abolish the Jury*, 57 American Law Review 42; *Trouble with the Jury System, 1 American Inst. of Criminal Law and Criminology*, 959; Elder, *Trial by Jury*, Harper's Monthly Magazine, 156:573.

The historian Trevelyan reports that even earlier, "the English jury system, while it protected our liberties, by no means always increased the fairness of trials". England Under the Stuarts, 22 (1949) Respected scholars of English law have expressed the view that in Sixteenth Century England, in cases in which the Crown was interested, the protection of trial by jury was illusory. Trials for treason were by jury and in most instances, offender was convicted. It is not at all clear that more injustice was done before the Star Chamber than would have been done in trial by jury with the Government exerting its influence on the jury. Radcliffe and Cross, *The English Legal System*, (4th Ed) 1965 p. 108.

Wormser, in his work *The Law*, (Simon and Schuster 1949) p. 275, states that there is much to be said against the jury system, the most severe criticism being the caliber of the juries. He points out the anomoly of having a technical case decided by such an assortment of jurors as a plumber's helper, a cook, an unemployed actor, a window washer, two clerks and six housewives who know nothing about business.

Justice Oliver Wendell Holmes, Jr. on juries: "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." Holmes' dissent in *Frank v. Mangum*, 237 U. S. 309, 345 (1915).

It has been pointed out that trial by jury in England, its so-called birthplace, is at a low ebb and that Parliament is constantly creating new offenses which are tried summarily without a jury. *The same writer states that a vast number of trials in the state courts of the United States take place before judges alone and that the popularity of jury trial is waning.* Riave, *Fair and Impartial Trial by Jury in the United States and England*, 50 Amer. Bar Assn. Journal 232, 234, (1964).

In an article in *The Times Picayune*, December 4, 1967, Sec. 2, page 2, it was reported that a Los Angeles, California defendant charged with the murder of six persons elected to be tried without a jury because he feared laymen "might be overwhelmed by the sheer volume of accusations".

McCart, in *Trial by Jury*, (Chilton 1964) p. 16, states that because of the right of defendants in state prosecutions to waive jury trials, only a minority of cases in the United States are tried by jury, and that this testifies to the public's confidence in the integrity of judges. The same author points out (pp. 116-117) that juries, composed of laymen, are required to pass on the manner and extent to which the law, as

explained in the judge's charge, fits the facts, and as such perform the legal function of interpretation and application.

Justice Story's opinion in *U. S. v. Battiste*, 2 Summer's Circ. Ct. Rep. (1835) is quoted by McCart on the question of juries following their emotions instead of the law:

> "In each they have the physical power to disregard the law as laid down to them by the Court. But I deny, that in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure."

McCart points out (p. 148) that if the law of the case is left to the decision of a jury there can be no consistency in law, as jurors act in the field of emotions present in a trial.

Both Justice Story and McCart disagree with Appellant's eccentric theory that juries are of value because they can be inconsistent, can ignore the law, and can give popular rather than lawful verdicts. "When the jury appears in this somewhat lawless role, it is time to inquire whether the law does not need revision." Kaplan, Trial by Jury, Talks on American Law (Vintage Books 1961), pp. 52-53.

Some drawbacks of the jury system are presented in Kircheimer, *Political Justice* (Princeton University Press, 1961), pp. 219-224, wherein the author points out that at best the jury is a "cumbersome relic" having "the quality of an echo, throwing back the most forceful sounds it receives." See also Kaplan, *op. cit: supra*, at 49.

Osborn, in *The Mind of the Juror*, (Boyd Printing Co. 1938) points out that twelve-man juries are too large to be efficient, that the requirement of unanimous verdicts defeats justice, that juries are not democratic in practice, as one or two men on the jury dominate and do the thinking for the others, that juries make undesirable compromises, that they are subject to prejudices and that they do not understand the principles of circumstantial evidence.

> "The jury has been severely criticized by the positivist school of criminology. Garofalo, Criminology 355-64 (Miller transl. 1914); Ferri, Criminal Sociology 485-97 (Kelly & Lisle transl. 1917). As a result it has been replaced in many civil law jurisdictions by professional and lay judges deliberating together." Silving, Essays on Criminal Procedure (Dennis & Co. 1964) p. 54 n. 209.

Silving points out that the nature of the function of the jury has been obscured in the course of its development. Today, a jury must exercise supra-rational capacities of moral judgment and mystically determine unsolvable quasi-scientific issues, as for example in *Durham v. U.S.*, 214 F.2d 862 (1954) the scientifically unanswerable question of whether an act is the product of a mental defect. Such a finding by a jury is the finding of something that can't be found. Such questions should be decided by specialist—judges. Silving, *op. cit. supra*, pp. 363-364.

In *Singer v. U.S.*, 380 U.S. 24, 35 (1965) this Court stated that although the Constitution has established trial by jury as the preferable mode of dis-

posing issues of fact, "as with any mode that might be devised to determine guilt, trial by jury has its weaknesses and the potential for misuse." The Court's language leads to the inescapable conclusion that although the Constitution regards trial by jury as "most likely" to produce a fair result, it is not the exclusive or essential mode and, under some circumstances, trial by jury might even produce unfair results.

In the Challenge of Crime in a Free Society, p. 145, the President's Commission on Law Enforcement states:

> "In 10 States sentences are fixed by juries rather than by judges. Data indicate that this is a poor practice. Jurors do not and cannot have the expertise to assess rationally the correctional needs of offenders; and juries, because of their size and their position of being half in and half out of the court system, are inappropriate recipients of sentencing information.
>
> "The extent of the failings of jury sentencing were vividly revealed in a recent survey by the Atlanta Crime Commission, which showed that in that city for some offenses first offenders received more severe sentences on the average than hardened recidivists."

The same Commission, while recommending that each State furnish consel for lesser offenses, also recommends that summary non-jury process be retained undisturbed for lesser offenses. Challenge of Crime in a Free Society, pp. 129, 151. The same report on p. 275 points out the necessity for expertise rather than "laymanship" in criminal administration.

Finally, in 5 The Reference Shelf No. 6, The Jury System (compiled by Julia E. Johnson, 1929) wherein the "pros and cons" of the jury system and writings thereon are compiled, the following arguments are presented against the jury system:

It has outlived its original purpose, as ours is a representative government with the majority of state judges elected by the people or by their elected representatives (N.B. Louisiana judges are all elected by the people and are not named "by the Crown", as appellant's quote from Blackstone would imply). The jury is based on antiquity and is an obstruction to more progressive methods. It is not an efficient trier of facts, the intellectual characteristics and the training of the average juror being low. The jury is ruled by prejudice rather than reason. The jury system is responsible in large measure for the delays in our court systems. The jury is expensive and wasteful. The judge, because of his expertise and sense of responsibility, is superior to the jury as a trier of fact.

The above criticisms are presented to show that the jury is not the model of perfection that appellant's "glittering generalities" attempt to make it.

The jury system has drawbacks, as many authorities have stated. And it also has its salutory effects. This appellee does not deny, but affirms that the scope of jury trial is subject to modification by the States, and that the extent of modification existing in the Louisiana jury trial system is entirely consistent with the maintenance of liberty and a fair trial.

G. RETROACTIVITY

Louisiana recently adopted its Code of Criminal Procedure, of which Art. 779 is a part, after many years of research and study by leading experts in the field of criminal procedure, under the supervision of the Louisiana State Law Institute.

A determined and sincere effort to comply with this Court's Fourteenth Amendment jurisprudence was made in the enactment of the Louisiana Code of Criminal Procedure as will appear from the following statement made by Prof. Dale E. Bennett of the Louisiana State University School of Law, one of the drafters of the Code of Criminal Procedure:

> "At the time when all members of the bar are faced with the responsibility of defending indigent defendants, it is particularly important that the rules governing the trial of criminal cases be stated as fully and clearly as possible. At the same time the code procedures must be sufficiently flexible to permit trial judges to adapt them to the special circumstances and necessities of particular cases. A definite attempt has been made to provide a statement in the new Code of many rules which are presently ascertainable only by a careful search of key Supreme Court decisions and miscellaneous statutes. The filling of such code gaps and hiatuses, so that the basic procedures are stated in a single volume, should be of substantial assistance to the lawyer who is called upon to defend only an occasional criminal case. *Another general objective of the new Code has been to adapt Louisiana's procedures to those federal requirements which apply to the states*

via the fourteenth amendment. There has also been a consideration of recently developed rules of other states which are aimed at providing more practical and fairer trial procedures. At the same time it was important to retain Louisiana's present basic procedures, and no innovation was adopted without a careful check of its practicality, and also of its fairness to the defendant and to the state. One constant aim was the elimination of rigid technical requirements which served no other purpose than to trip an inexperienced defense lawyer or to harass a busy district attorney." Bennett, The 1966 Code of Criminal Procedure, 27 La. L Rev. 175 (1966) (Emphasis supplied)

"Trial by jury has never been affirmed to be a necessary requisite of due process of law." *Maxwell v. Dow*, 176 U.S. at 603 (1899). This Court has consistently held that trial by jury is not required by the Fourteenth Amendment and it has never been deviated from that position, approving its stand thereon in many subsequent decisions which have been herein above cited.

In reliance upon this Court's consistent position for many years that the Fourteenth Amendment does not require a state to provide trial by jury, Louisiana, since 1898, a period of sixty nine years, has provided for the trial of misdemeanors by a judge without a jury; and since 1852 it has provided for the modification of the twelve man unanimous jury required under the Sixth Amendment. This has determined the size of its courthouses, the number of judges, district at-

torneys and other officials necessary for handling criminal matters. (See statistics in Appendix D.) A century of jurisprudence by this Court that the Sixth Amendment does not apply to jury trials in state courts should not be shrugged off with the attitude that "that's just Louisiana's tough luck". If this Court should determine that the Sixth Amendment applies directly to jury trials in state criminal proceedings, then the conviction of numerous felons by less than twelve man unanimous juries and the conviction of all persons charged with misdemeanors would be invalidated if such a decision would apply retroactively. The administration of criminal justice in Louisiana, as well as in those states which allow trial by judge of misdemeanors, providing for more than six months in jail and those states defining petty crimes in a different manner from the federal definition, and those states providing for less than twelve man unanimous juries, would be thrown into chaos.

In view of the rising crime rate as shown by the latest F. B. I. Crime Report (a 15% increase over last year and in the city of New Orleans a 30% increase over last year), this would indeed be tragic for the citizens of this country.

Accordingly, it is submitted that this Court should not apply the Sixth Amendment jury trial right to the states, but that if it does, it should clearly enunciate the principle that such right does not apply retroactively. See *Johnson v. New Jersey*, 364 U.S. 719 (1966).

VI. CONCLUSION

In view of the foregoing, it is respectfully submitted:

(1) That appellant's prosecution met "petty offense" standards under *Cheff v. Schakenberg*, supra, and was therefore not entitled to a jury trial under the Sixth Amendment even if that Amendment applied;

(2) That in any event the Sixth Amendment jury trial right does not apply directly to the states;

(3) That if the Sixth Amendment jury trial right applied, all states would be constitutionally obliged to try all offenses that did not need federal "petty offense" standards by twelve-man unanimous juries;

(4) That trial by jury is not essential to a fair trial under the due process clause of the Fourteenth Amendment;

(5) That it is not essential to liberty that Louisiana provide the right to jury trials in simple battery prosecutions; and accordingly, appellant's conviction and the judgment of the state court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, William P. Schuler, a member of the bar of the United States Supreme Court, hereby certify that a copy of the above and foregoing brief has been served on counsel for Appellant:

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New Orleans, La., this ____ day of December, 1967.

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